

Tagore Law Lectures—1872.



THE HISTORY

AND

CONSTITUTION OF THE COURTS

AND

LEGISLATIVE AUTHORITIES IN INDIA.

BY

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P R E F A C E.

THIS book concludes the labors of my three years' Professorship. It embraces a history of the Legislative Councils and of the judicial institutions which have been established in this country by the English; and an account is added of the existing Courts and Councils which make and administer the laws now in force in British India. The subject is one which is, in many respects, intricate and dull, but it is essential to an ordinary acquaintance with the Government and constitution of the empire.

H. C.

August 12th, 1872.

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LECTURE I.

EARLY HISTORY: THE GRANT OF THE DEWANNY.

Introduction—Commencement of established institutions—Character of antecedent history—First introduction of Europeans into India—Early history of the East India Company—Territorial acquisitions—Fall of the Mogul Empire—Aggressive policy of the Company—Settlement in Bengal—Position of the English before their Conquest—Legislative Authority of the Company during that period—Charter of Elizabeth—Of James I—Of Charles II—Of William III—Charters of 1726 and 1753—Judicial Authority of the Company during that period—Necessity for obtaining it—Early Charters—Mayor's Courts—Jurisdiction of the Governor and Council—Mayor's Courts and Courts of Requests—Subjugation of Bengal—Civil Disorders and Anarchy—Elements of Civil Order—Relations of the Mogul, the Nabob, the Crown and the Company—First Attempt to re-organize Society—Absence of Legitimate Authority—No Judicial Coercion over Europeans—Reforms of Lord Clive—Necessity for Grant of Definite Authority.

I SHALL endeavour to present in this course of ^{Introduc-} lectures a general view of the legislative power and judicial authority now and heretofore exercised in British India. And in doing so it is unnecessary to refer with the accustomed detail to the various enactments passed during the rule of the Company in reference to this subject. The earlier legislation is treated at length in Harington's Analysis which was published in 1805 ; and a long string of Acts and Regulations is to be found in Auber's Analysis,

LECTURE] I. Morley's Digest, and other works. But my object in
— this volume is to separate the existing legislative and judicial institutions from the previous history of those institutions ; reducing the latter as much as possible to a continuous narrative. The subject is preliminary to the study of the laws in force in British India, and deals with the character and powers of the councils and tribunals which respectively make and administer those laws. In any question of difficulty as to the source and early boundaries of power in reference to any institution, the particular enactments relating to it must always be consulted. So far as regards the legislation of the past, its general character and historical bearing will here alone be explained, that which regulates existing institutions will be treated in greater detail.

The suppression of the Indian Mutinies and the assumption of the government in name as well as in reality by the English Crown led to a consolidation and re-establishment of the Indian empire ; and the year 1861, in which the Indian Councils' Act and the Indian High Courts' Act were passed, marks the close of a tedious and intricate period of Indian constitutional history. Those enactments and the subsequent legislation which has been effected here, especially in the last two years under the government of Lord Mayo, are the foundation of nearly the whole judicial and legislative authorities now existing in India. I may

therefore say at the outset that at that date I shall divide the historical sketch of the earlier institutions from the account of the existing constitution of the Courts and Legislative authorities here established. The time has come when most of the legislation on these subjects even down to the very recent period which I have mentioned, is no longer of detailed interest requiring constant reference. It has passed into the region of history as completely as the victories of Clive and the policy of Hastings, and in order to be of the slightest interest, must be studied in reference to the political circumstances which influenced it and the conflicting interests and passions which lay behind it.

Constitutional history in this country has nothing to do with the steady spontaneous growth of national institutions. It is a record of experiments made by foreign rulers to govern alien races in a strange land, to adapt European institutions to Oriental habits of life, and to make definite laws supreme amongst peoples who had always associated government with arbitrary and uncontrolled authority. There is considerable vacillation of purpose exhibited in those experiments, influenced as they were by conflicts of opinion and the rivalry of interests, but on the whole there was a steady advance towards securing impartial justice and legislation.

The year 1781 marks the most important era in the history now under consideration. It terminated

Commence-
ment of
established
institutions.

LECTURE
1.

a period of fierce animosity and struggle between those who wished to see English law and Courts of Justice introduced at once into the country and rendered supreme over the executive ; and those who considered that such a policy was wholly impracticable, and that, circumstanced as the English then were, government must for a long time to come control the authority of the Courts. It commenced the era of independent Indian legislation ; of the authority of the Supreme Court, as it continued more or less to be exercised for eighty years ; of the establishment of a Board of Revenue " entrusted with the charge and administration of all the public revenues of the provinces ; and invested in the fullest manner, with all powers and authority, under the control of the Governor General and Council ;"* of the recognition by Act of Parliament of the established Sudder and provincial Courts ; and of the recognition by Act of Parliament and in the Revised Code of Bengal of the right of Hindus and Mahomedans to be governed by their own laws and usages. The plan of government, both as regards legislation and the Courts of Justice, in that year assumed a definite shape, and although many changes of course ensued in the long period (1781—1861), which separated the administration of Warren Hastings, the first Governor-General of India, from the close of that of Lord Canning, its first Viceroy, still they were changes of detail, often

* 2 Harington's Analysis, p. 35.

of great importance, but leaving unaltered the general character of the system then introduced. •

LECTURE
I.

Confining ourselves therefore in the first place to the exclusively historical portion of the subject, I shall take the year 1781 as the dividing point of time at which the character of that history essentially changes, at which the boundaries of authority have at last become strongly defined.

Previous to that date the general character of Indian history, or of the history of the government by the English of their Indian possessions, is one of military struggle and civil tumult interspersed with occasional efforts to organize society. A vivid description of it is given by Lord Macaulay in his celebrated Essays on Lord Clive and Warren Hastings. The chief centres of interest are the individual efforts and achievements of the two powerful chiefs who laid the foundation of the British empire in India, and to whom the natives of India owe a juster government, greater security, greater wealth, and means of social happiness and order, than they ever experienced before or would ever have been likely to obtain had Clive and Hastings never lived.

Character
of antece-
dent
history.

Previous to that date, moreover, as it seems to me, the history of Courts and legislatures is mingled with the history of the executive, and they must be pursued together. For notwithstanding the desperate attempt in 1773, by means of the Supreme Court then established, to introduce law

LECTURE
I.

and order, the rash and ignorant though well-intentioned policy of which that scheme betrays the existence, only increased the civil confusion, and in the midst of the greatest disorder almost paralyzed the authority of government, without substituting any other means of security for life and property. It will be convenient therefore, to divide the history of this subject into two portions ; to give a general view of the Company, its conquests and its efforts at social organization with reference to surrounding circumstances down to 1781, and afterwards to trace separately the subsequent history of the legislative and judicial institutions, which by that time had sprung into separate and definite existence.

The first branch of the subject is worthy of considerable attention. It includes within its scope the two most important events of the grant of the dewanny by the Mogul Emperor, and the Parliamentary attempt to settle Indian affairs by the Regulating Act. Those occurrences refer exclusively to Bengal. The other Presidencies were governed in imitation of the policy pursued by the Supreme Government in reference to the chief Presidency. The problems of difficulty were worked out in Bengal and their solution was transferred to Madras and Bombay.

First introduction of Europeans into India.

To start from the beginning I may remind you that the Portuguese were the first European nation who persevered in carrying on trade and acquiring dominion in India. Their countryman Vasco di Gama

had discovered the passage round the Cape of Good Hope, and thus for a whole century conferred upon the nation to which he belonged a monopoly of trade and commerce in the East. Subsequently the Dutch followed the Portuguese, and subverted their power. Finally English merchants endeavoured to prosecute a trade with India, and, their efforts proving successful, a charter was granted by Queen Elizabeth in the year 1600, incorporating the London East India Company, and giving to them the exclusive right of trading to all parts of Asia, Africa, and America beyond the Cape of Good Hope, eastward to the Straits of Magellan.

With regard to the existence of the Company, it seems that after the restoration of Charles II, various attacks were made upon the existence and enjoyment of exclusive rights which had been conferred by the Crown irrespective of Parliament; but they were made without effect. In 1698,* however, another Company was incorporated under authority of an Act of Parliament by a separate charter under the name of the English East India Company. Ten years afterwards the two Companies were united under the award of Lord Godolphin in the sixth year of Queen Anne; the charter granted by William III in 1698 remaining as the foundation of the privileges of the united Company, under which the Court of Directors was constituted and the

Early history of the East India Company.

* See 9 & 10 William and Mary. Chapter 44.

LECTURE
I.

General Court of Proprietors were vested with the chief authority and control over the affairs of the Company. This constitution remained unchanged till the Regulating Act of 1773 ; under the provisions of which statute a Governor-General and Council were first nominated, with power over the whole of the Company's possessions in India, a Board of Control being shortly afterwards formed at home.

During the 65 years which elapsed from the union of the two Companies under the award of Lord Godolphin down to the Regulating Act of 1773, great acquisitions of territory were made ; and the position of the Company was gradually changed from that of tenants of factories, owing obedience to the Mogul Emperor to one of practical and independent sovereignty.

Territorial
acqui-
sitions.

With regard to those acquisitions of territory, the first possession of the English was the Island of Bombay ceded to Charles II in 1661 by the King of Portugal as part of the marriage dowry of the Infanta. Charles II granted it to the East India Company, who about the same time gained possession of some factories on the west coast of India. Somewhat later, factories were established at Madras and other places on the east coast. Last of all the Company made trading settlements in Bengal, and founded Calcutta. The factories of Bombay, Madras, and Calcutta became the leading factories in their different localities, and exercised control and super-

vision over the subordinate depôts and places in their vicinity. LECTURE
I.

The ruin of the Mogul Emperor proceeded with great rapidity after the death of Aurungzeb in 1707. He was succeeded by a series of nominal sovereigns, whose dominions were invaded and whose authority was defied. The Mahrattas overran the country, which they either subjected to their rule or wasted by their plunder. Even the European factories were in danger, and the settlement of Calcutta was fortified and enclosed within the Mahratta ditch. It was during this feud between the Mahratta and the Mahomedan, which spread from one end of the empire to the other, and threw the whole peninsula into confusion, that the French and English first began the work of conquest and annexation. The conquests of the French the principal of which were in the Madras Presidency were first disputed by Clive in the year 1750, and from that time the power of the English continued steadily to increase and that of the French to decline. In a very few years the English occupation of Madras was placed beyond the reach of French aggression ; the vigour and force which the long rivalry had developed serving to secure to the Presidency of Madras the leading rank in the Company's settlements.

Thus Madras became the most important possession of the Company. It was the scene of the early Aggressive
policy of
the Com-
pany.

LECTURE
I.

victories of Lord Clive, and of the first successful efforts to acquire political power and dominion over the country. It was not however till the middle of the 18th century that the Company began to combine military and political aims with the ordinary pursuits of a mercantile corporation. Their rivalry with the French, the neighbourhood of the Mahrattas, and the frequent attacks, to which they were in consequence exposed, speedily converted their Madras servants into soldiers; and paved the way to occasional conquests. Eventually the decay of the Mahomedan power in India, the incursions of the Mahrattas, and the rivalry of the French rendered it necessary for the Company to choose between immediate withdrawal and a policy of aggression.

Settlement
in Bengal.

Up to this time, although the English had built Fort William and settled in Bengal, they had not departed from the character of merchants and factors. The accession of Surajah Dowlah in 1756, who entered upon a policy of repression which he had not the resources to sustain, was the commencement of a series of struggles which ended in the establishment of the Company's authority in the lower and afterwards in the upper Provinces of Bengal. The capture of Fort William and the tragedy of the Black Hole roused the vengeance of the settlement at Madras. Clive came to Bengal, recovered Calcutta, and in the next year by the Battle of Plassey destroyed the power of Surajah

Dowlah, and obtained possession of Moorshedabad with authority over the whole of Bengal.

LECTURE
I.

The foregoing observations will serve as a sketch of the origin and progress of the Company and their conquests down to and shortly after the Battle of Plassey. During this period wherever the English settled, except in the Island of Bombay which had been ceded in full sovereignty to Charles II, the general character of their position was that it was obtained by leave of the Native Government. In Bengal especially their settlements were founded and their factories fortified with that leave, in districts purchased from the owners of the soil by permission of that Government, and held under it by the Company as subjects owing obedience, as tenants rendering rent, and even as officers exercising by delegation, a part of the authority of the Native Government.*

Position of
the English
before the
conquest.

The ordinary consequences of this state of things would have been to render the English subject to the Native Government and amenable to its laws. They could not however be governed by the law of the Koran, and therefore from necessity they remained subject to their own law, and were obliged to take measures for introducing and administering it. Before the English assumed sovereign powers and independence of native authority, their position was

* See Judgment of Lord Brougham in the *Mayor of Lyons v. East India Company*, 1 Moore's Indian Appeals, p. 272.

LECTURE
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extremely anomalous. Though their factories were part of the dominion of the Mogul, their own law was administered in them, and their own national character imparted to them as completely as if they were parts of English territory. A foreigner residing in them and carrying on trade was held to take his temporary national character not from the Mogul dominion, to which they were subject, but from the British possessions.*

(Legislative
authority
of the
Company
during that
period.

Under these circumstances, it became necessary in very early days of the existence of the Company, that the Crown should grant to them certain legislative and judicial authority to be exercised in their East Indian possessions. That authority, however, it seems clear, was only intended to be exercised over their English servants, and such native settlers as placed themselves under their protection.

Charter of
Elizabeth.

With regard to the early legislative authority the Charter of Queen Elizabeth in 1601 granted to the Governor and Company or the more part of them being assembled power, long before they possessed any territory or sovereign authority “to make, ordain, and constitute such and so many reasonable laws, constitutions, orders, and ordinances, as to them or the greater part of them being then and there present, shall seem necessary and convenient for the good government of the said Company and of all

* See the *Indian Chief*, per Lord Stowell, 3 Rob. Adm. Rep. p. 29.

factors, masters, mariners, and other officers employed or to be employed in any of their voyages, and for the better advancement and continuance of their trade and traffic." They were also empowered to put in use and execute such laws, "and at their pleasure to revoke and alter the same or any of them, as occasion shall require" and to provide such pains and penalties by imprisonment or fine as might seem to them necessary to secure their due observance.

James I by his Charter granted in 1609 renewed of James I. the same power, both Charters containing the proviso "so always as the said laws, orders, constitutions, ordinances, imprisonments, fines, and amerciaments be reasonable and not contrary or repugnant to the laws, statutes, or customs of this our realm."

Charles II's Charter granted in 1661, contained of Charles II. a similar provision.

In the Charter relating to the Island of Bombay, of which the sovereignty had been ceded, granted by Charles II in the year 1669, a similar power of legislation was given. •

All these early Charters were surrendered when the two Companies were amalgamated under the award of Lord Godolphin. The laws passed in pursuance of them were directed to be published ; but no trace of them now exists. They probably were for the most part concerned with the trade of the Company, preserving its monopoly and repressing interference. It is probable that the powers were not

LECTURE
I.
— extensively used, but it was necessary that they should exist, in order to provide for any emergency that might arise.

of William
III.

The Charter granted by William III in 1698 became the foundation of the united Company, which was subsequently called the East India Company.* By it, the Company were vested with the government of all their forts, factories, and plantations, the sovereign power being reserved for the Crown. Courts of Judicature were also established as before, but nothing was then said about a power of legislation.

Charters of
1726 and
1758.

In George I's Charter of 1726, which also established the Mayors' Courts, the Governors and Councils of the three Presidencies were vested with the power "to make, constitute, and ordain bye-laws, rules, and ordinances for the good government and regulation of the several corporations hereby created, and of the inhabitants of the several towns, places, and factories aforesaid respectively, and to impose reasonable pains and penalties upon all persons offending against the same or any of them." Such laws and penalties were to be agreeable to reason, and not contrary to the laws and statutes of England. They were not to have any force or effect until the same had been approved and confirmed by order in writing of the Court of Directors. And then the Charter proceeded "We do hereby ordain

* Vide 3 and 4 Wm. IV, Chap. 85, Section 111.

and declare that none of the corporations hereby ^{LECTURE I.} created shall have a power or authority to make any bye-laws, rules or ordinances whatsoever other than such rules as they are respectively by these presents empowered to make." The Charter of 1753 gave a similar power omitting the passage quoted.

With regard to the grant of judicial authority to be exercised in the Company's settlements, we might reasonably expect that it would be called for and required before the necessity arose for establishing any legislative authority. The actual decision of disputes in an infant society is of practical importance long before the necessity of a definite body of rules is felt. Moreover the English were supposed to bring with them such of their own laws as were applicable to them in the circumstances in which they were placed. And factories established amongst races alien in religion, habits and customs have always been deemed by the law of nations which has prevailed in Christendom to be so far exclusive possessions, or at least privileged places that all persons during their residence within them have been considered for most purposes to be clothed with the national character of the State to which the factory has belonged.

Accordingly it seems that as early as 1618, Sir Thomas Roe, the ambassador of James I, had secured by treaty with the Mogul the privilege for the factory at Surat, that disputes between the

Judicial
authority
of the
Company
during that
period.

Necessity
for obtain-
ing it.

LECTURE
I.

English only should be decided by themselves. The East India Company, before the end of the 17th century, had obtained and made use of the permission to build fortifications at Madras and Calcutta, and thus established and defended their own authority within their own factories. Under these fortifications, Natives built houses as well as Europeans. And when the Nawab* on that account was about to send a Kaji, or Judge, to administer justice to the Natives, the Company's servants bribed him to abstain from this proceeding. At the same time they held the Island of Bombay under a grant in perpetuity from the Crown of England. It was absolutely essential therefore in very early days that some authority to administer justice and some regularly constituted Judicial authorities should exist in the possessions of the Company.

Early
Charters.

In the earliest Charters granted by the Crown, power was given to the Company in a general and indistinct way to administer justice to those who should live under them. In 1661 Charles II gave, by royal Charter to the Governor and Council of the several places belonging to the Company in the East Indies, power "to judge all persons belonging to the said Governor and Company or that should live under them in all causes, whether civil or criminal, according to the laws of the kingdom and to execute justice

* See judgment of Lord Brougham in *Mayor of Lyons v. East India Company*, 1 Moore's Indian Appeals, p. 272.

accordingly." In grants to the Company within the next thirteen years of the islands of Bombay and St. Helena, full power was given for the exercise by the Company of Judicial authority according to the British laws. And in 1683 Charles II granted a further Charter in which the royal will was declared that a Court of Judicature should be established at such places as the Company might appoint; to consist of one person learned in the Civil laws and two merchants all to be appointed by the Company and to decide according to equity and good conscience and according to the laws and customs of merchants by such rules as the Crown should from time to time direct either by the Great Seal or Privy Seal; failing which directions by such ways and means as the Judges should think best. These provisions were continued in some subsequent Charters, but they do not appear to have been effectual for the purpose for which they were framed.

In less than twenty years after the United Company was established under the Act of Queen Anne, its Court and Directors represented by petition to George I that there was great want at Madras, Fort William and Bombay of a proper and competent power and authority for the more speedy and effectual administering of justice in civil causes and for trying and punishing of capital and other criminal offences and misdemeanours; and they accordingly prayed permission to establish

LECTURE
I.

Mayors' Courts at those places. Thereupon the existing Courts, whatever they may have been, were superseded, and in the year 1726 (13th Geo. I) the Crown by Letters Patent established Mayors' Courts at Madras, Bombay, and Fort William, each consisting of a Mayor and nine Aldermen, seven of whom with the Mayor were required to be natural born British subjects. They were declared to be Courts of Record and were empowered to try, hear, and determine all civil suits, actions, and pleas between party and party.

Jurisdiction of the Governor and Council.

By virtue of the same Letters Patent each Local Government consisting of a Governor and Council was constituted a Government Court of Record to which appeals from the decisions of the Mayor's Court might be made in all causes involving sums under 1000 pagodas.* In causes involving sums above that amount an appeal lay from the Government Court to the King in Council. The Government Court was further constituted a Court of Oyer and Terminer, and was authorized and required to hold quarter Sessions for the trial of all offences excepting high treason. The Mayors' Courts were empowered to grant probates of wills and administration to the effects of intestates.

The Charter of George I recited that the Company "had by a strict and equal distribution of

* A Pagoda is a Madras coin, never current in Bengal, of the value of about eight shillings of English money.

justice very much encouraged not only our own subjects but likewise the subjects of other princes and the natives of adjacent countries to resort to and settle in the said forts, towns, factories, and places by which means some of them had become very populous, especially the places called Madras, Bombay, and Fort William in Bengal." It also recited that "there was great want in all the said places and in other settlements of the Company of a proper and competent power and authority for the more speedy and effectual administering of justice in civil causes and for the trying and punishing of capital and other criminal offences and misdemeanours." The criminal trials were directed to be conducted "in the same or the like manner and form as near as the conditions and circumstances of the place and inhabitants will admit of as any our Justices of the Peace or Commissioners of Oyer and Terminer and Gaol Delivery do or may proceed by virtue of any commission by us granted for that purpose."

This Charter was superseded by the Charter granted to the same Company in 1753 (26 Geo. II) which re-established Mayors' Courts at Madras, Bombay, and Calcutta, with some amendments intended to remedy defects of which the Company had complained. The new Letters Patent also established a Court of Requests at each of the said places for the determination of suits "where the debt duty or matter in dispute should not exceed

Mayors'
Courts and
Courts of
Requests.

LECTURE
I.

five pagodas." Both Courts were made subject to a control on the part of the Court of Directors, who were authorized by the Letters Patent to make "bye-laws, rules, and ordinances for the good government and regulation of the several Courts of Judicature established in India." The chief alteration effected by the new Letters Patent was that the Courts which they established were limited in their civil jurisdiction to suits between persons who were not Natives of the several towns to which the jurisdiction applied. Suits between Natives were directed not to be entertained by the Mayors' Courts unless by consent of the parties.

These Letters continued in force in Bengal for about twenty years, and in Madras and Bombay for a longer period. A committee of secrecy, appointed to enquire into the state of the East Indian Company, observed with reference to the Mayors' Court that the Judges were justly sensible of their own deficiency and had frequently applied to the Court of Directors for assistance. Application was thereupon made to the Crown for a new Charter of Justice for Bengal.

Thus the first Courts of Record established in Bengal existed for nearly fifty years. It does not appear whether in the original Letters Patent or in those which with some alterations were substituted for them in 1753, there was any intention on the part of the Crown to assert any territorial dominion.

In the Charter of 1753 although there was no precedent for it in the Charter of 1726, civil suits between Natives were expressly excepted from the jurisdiction of the Mayors' Courts, and directed to be determined among themselves ; which appears to involve a renunciation of sovereign authority at that time over Natives.

This, then, was the extent of legislative and judicial authority possessed by the Company at the time when the events which succeeded the Battle of Plassey compelled them to undertake the task of reconstituting and reorganizing society in the Lower Provinces of Bengal, *i. e.*, to assume all the functions of sovereignty. A period of greater political confusion than that which followed the subjugation of those provinces, it is impossible to imagine. The conquered were without spirit or means of defence ; the conquerors exhibited all that ravening for plunder which sudden and easy acquisition of wealth inspires, possessed scarcely any of the elements of social union themselves, and were both unwilling and unable to undertake the duties of government. The position was pregnant with all the evils which the Normans introduced amongst the conquered Saxons in England, evils of rapine, plunder, and tyranny without the redeeming accompaniments of the strong government and determined spirit of order which belonged to the Norman conquerors, who were the most civilized people of early Europe,

Subjugation of Bengal.

LECTURE

I.

and the most advanced in the arts of government and in political organization. The victors of Bengal were for the most part anxious to plunder and then withdraw from a climate which they regarded as fatal; they were separated by a year's journey from the government to which they owed allegiance, and were as a general rule incapable from their habits and knowledge and previous pursuits of conceiving higher aspirations or duties than those of augmenting the dividends of their Company.

Civil disorders and anarchy.

Shortly after the subjugation of Bengal, Clive departed to England, and during the five years which followed, the misgovernment of the English, says Lord Macaulay, was carried to a point such as seems hardly compatible with the very existence of society. They pulled down one prince, and set up another in his turn, and on each accession to the throne, the new monarch divided among his foreign masters the treasures of his predecessor. The position of the Natives under these circumstances is vigorously described by Lord Macaulay:—"The servants of the Company obtained not for their employers but for themselves a monopoly of almost the whole internal trade.* They forced the Natives to buy dear and to sell cheap. They insulted with impunity the tribunals, the police and the fiscal authorities of the country. They covered with their protection a set of Native dependents who

* Macaulay's *Essays*, Vol. III, p. 177.

ranged through the provinces spreading desolation and terror wherever they appeared. Every servant of a British factor was armed with all the power of his master ; and his master was armed with all the power of the Company. Enormous fortunes were thus rapidly accumulated at Calcutta, while thirty millions of human beings were reduced to the extremity of wretchedness. They had been accustomed to live under tyranny, but never under tyranny like this. They found the little finger of the Company thicker than the loins of Surajah Dowlah. Under their old masters they had at least one resource : when the evil became insupportable, the people rose and pulled down the government. But the English government was not to be so shaken off. That government, oppressive as the most oppressive form of barbarian despotism, was strong with all the strength of civilization. It resembled the government of evil genii, rather than the government of human tyrants.

* * * * *

The unhappy race never attempted resistance. Sometimes they submitted in patient misery, sometimes they fled from the white man as their fathers had been used to fly from the Mahratta ; and the palanquin of the English traveller was often carried through silent villages and towns which the report of his approach had made desolate."

The position was shortly this. The servants of a mercantile Company, with some judicial and

Elements
of civil
order. ✓ R

LECTURE
I.

legislative authority existing amongst them wholly inadequate even to their own requirements, with all bands of discipline totally relaxed, were the military masters of the country, practically freed from all control from England. Sovereignty and the right of administering civil and criminal justice were vested in the Mogul Emperor, whose government of the provinces of Bengal consisted* of two parts; the Dewanny or collection of the revenues and the administration of the principal branches of the department of civil justice, and the Nizamut or the military branch of the government, with the superintendence of the criminal department of judicature : and of these the Dewanny was subordinate to the Nizamut.

Relations
of the
Mogul the
Nabob, the
Crown and
the
Company.

The powers and duties of government had long been delegated to the Nabob of Moorshedabad, but the victories of the English had finally dislodged his authority. Those victories in reality transferred the rights of sovereignty to the English Crown; but the seat of that government was in London, and it was practically impossible for the Crown to exercise its rights. The Company on the other hand were by no means desirous of invoking the aid of the government at home; they regarded any step in that direction as one which tended to introduce a power into India which was likely to prove fatal to their revenues and authority. The Directors of

* Mills' History of India, Vol. IV, p. 19.

the Company prescribed mercy and justice, but demanded an enormous revenue, which it was impossible to obtain without oppression and wrong. No restraint of moral duty or legal responsibility deterred the conquerors, while the only authority in England which they recognized, *viz.*, the Board of Directors, virtually and practically encouraged the excesses of their administration. Scenes of misery and oppression ensued which Lord Macanlay stigmatizes as the most frightful which the world has seen, a prostrate people exposed to all the strength of civilization without its mercy.

Lord Clive, in 1765, landed in India for the third time to undertake duties as considerable and as arduous as those which devolved on William the Conqueror after the Battle of Hastings. The independence of the natives was crushed, while the means at his disposal for the organization of government were of the slenderest description. He decided at once to avail himself of the outstanding sovereignty of the Mogul. The Directors of the Company stood between him and the sovereignty of the English Crown; and that source of authority, the most obvious one to resort to, was consequently denied to him. He proceeded to obtain the grant of the Dewanny from the Mogul Emperor.

First
attempt to
reorganize
society.

That act is generally regarded as the acquisition of sovereignty by the English. The collection of

LECTURE
I.

revenue in India involved the whole administration of civil justice, and that, together with actual possession and military power, nearly completed the full idea of sovereignty. Still in name it was held in vassalage from the Mogul ; and the Nizamut or administration of criminal justice remained with the Mogul's lieutenant the Nabob of Moorshedabad.

Although the grant of the Dewanny is generally regarded as the grant of sovereignty for the want of any better and more formal transference of power ; yet its real motive and intention was to avoid that acquisition. It however, vested in the Company's government the reality or the semblance of legitimate authority over the natives, which, together with the actual military power, was sufficient for the purposes of government. The view which the Directors took of the transaction is as follows:—

“ We conceive* the office of Dewan should be exercised only in superintending the collection and disposal of the revenues. This we conceive to be the whole office of the Dewan. The administration of justice, the appointments to offices, zemindaries, in short whatever comes under the denomination of civil administration, we understand, is to remain in the hands of the Nawab or his ministers.”

Absence of
legitimate
authority.

So far, however, as authority over the English servants of the Company were concerned, whom it was

* Despatch of 17th May 1768, and see Torrens' Empire in Asia, p. 63.

Lord Clive's object firmly to restrain, the difficulties were as great as ever. His power to inflict upon them adequate punishment either for disobedience to orders or for any other species of misconduct was in a civil point of view limited to the slender powers conferred on the Mayors' Courts. Neither he nor the Directors could derive from the Mogul Emperor authority over Englishmen or Europeans. The only authority then existing in India to which they were amenable was derived from the Charter of Justice which established the Mayors' Courts in 1753. That Charter renewed the Courts of 1726 ; which were established in the infancy of British rule, with a view to maintain order in a few factories, and were totally inadequate to the wants of government after the Battle of Plassey and the conquest of Bengal.

For, so far as Bengal was concerned, it simply empowered the Mayors' Court of Calcutta as a Court of Record, to try all civil suits arising between Europeans, within the town or factory of Calcutta, or the factories dependent upon it ; it also constituted the President and Council a Court of Record, to receive and determine appeals from the Mayors ; it further erected them into Justices of the Peace with power to hold quarter sessions ; and into Commissioners of Oyer and Terminer, and general gaol-delivery for the trying and punishing of all offences, high treason,

LECTURE I. — excepted, committed within the limits of Calcutta and its dependent factories.

No judicial coercion over Europeans. This extent of jurisdiction, says Mr. Mill,* measured by the sphere of the Company's possessions at the time when it was granted deprived them of all powers of judicial coercion with regard to Europeans over the wide extent of territory of which they now acted as the sovereigns. They possessed indeed the power of suing or prosecuting Englishmen in the Courts of Westminster; but under the necessity of bringing evidence from India, this was a privilege more nominal than real. And in case of an Indian Governor or Judge exceeding the scanty and inadequate power which he possessed, he was liable in an action in the same Courts.

Reforms of Lord Clive. It is fairly claimed in praise of Lord Clive that, during the twenty months in which he ruled Bengal, he effected considerable reforms. The chief was the prohibition of the private trade of the servants of the Company, and the substitution of a liberal system of remuneration. By these means the rapid acquisition of wealth was stopped, and one great motive for oppression and extortion was removed. He also by obtaining the grant of the Dewanny placed the government of Bengal on a new footing, and established its relations to the natives on a footing of definite civil responsibility.

* Mill's History of India, Vol. III, p. 343.

“The power of the English in that province,” LECTURE I.
 says Lord Macaulay,* “had hitherto been altogether
 undefined. It was unknown to the ancient con- Necessity
 for grant of
 definite
 authority.
 stitution of the empire, and it had been ascertained
 by no compact. It resembled the power which, in
 the last decrepitude of the Western Empire, was
 exercised over Italy by the great chiefs of foreign
 mercenaries, the Ricimers and the Odoacers, who
 put up and pulled down at their pleasure a suc-
 cession of insignificant princes, dignified with the
 names of Cæsar and Augustus. But as in Italy,
 so in India, the warlike strangers at length found
 it expedient to give to a domination which had
 been established by arms the sanction of law and
 ancient prescription. Theodore thought it politic
 to obtain from the distant Court of Byzantium a
 commission appointing him ruler of Italy; and
 Clive in the same manner applied to the Court
 of Delhi for a formal grant of the powers of which
 he already possessed the reality. The Mogul
 was absolutely helpless; and, though he murmured
 had reason to be well-pleased that the English
 were disposed to give solid rupees which he never
 could have extorted from them in exchange for a
 few Persian characters which cost him nothing.
 A bargain was speedily struck; and the titular
 sovereign of Hindoostan issued a warrant empower-
 ing the Company to collect and administer the
 revenues of Bengal, Orissa, and Behar.”

* Macaulay's Essays, Vol. III, p. 186.

NOTE :—I subjoin* the text of the Firmaund granted by the King Shah Alum to the Company in 1765.

At this happy time our royal Firmaund, indispensably requiring obedience, is issued; that, whereas, in consideration of the attachment and services of the high and mighty, the noblest of exalted nobles, the chief of illustrious warriors, our faithful servants and sincere well-wishers, worthy of our royal favors, the English Company, we have granted them the Dewanny of the Provinces of Bengal, Behar, and Orissa, from the beginning of the Fussel Rubby of the Bengal year 1172, as a free gift and ultungan, without the association of any other person, and with an exemption from the payment of the customs of the Dewanny, which used to be paid by the Court. It is requisite that the said Company engage to be security for the sum of 26 lakhs of rupees a year for our royal revenue, which sum has been appointed from the Nabob Nudjum-ul-Dowla Behauder, and regularly remit the same to the royal Circar; and in this case, as the said Company are obliged to keep up a large Army for the protection of the Provinces of Bengal, &c., we have granted to them whatsoever may remain out of the revenues of the said provinces, after remitting the sum of 26 lakhs of rupees to the royal Circar, and providing for the expenses of the Nizamut. It is requisite that our royal descendants, the Viziers, the bestowers of dignity, the Omrahs high in rank, the great officers, the Muttasaddes of the Dewanny, the manager of the business of the Sultanut, the Jaghirdars and Croories, as well the future as the present using their constant endeavors for the establishment of this our royal command, leave the said office in possession of the said Company, from generation to generation for ever and ever. Looking upon them to be assured from dismission or removal, they must, on no account whatsoever, give them any interruption, and they must regard them as excused and exempted from the payment of all the customs of the Dewanny and royal demands. Knowing our orders on the subject to be most strict and positive, let them not deviate therefrom.—*Written the 24th of Sophar, of the 6th year of the Juloos, the 12th of August 1765.*

* Aitchison's Treaties (India), p. 60.

LECTURE II.

EARLY HISTORY: THE REGULATING ACT.

Grant of the Dewanny—Its Consequences—Antecedent Position of the Native Courts—Native Agency in Civil Justice retained till 1772 under Supervision—The Company's Supervision thereof—Authority of Native Dewans—Supervision gradually extended—Native Agency in Criminal Justice retained—The Company's Supervision thereof—Change of Policy—The Company undertake the Administration of Civil Justice—Also of Criminal Justice—Chief Criminal Court—Chief Civil Court—Character of Warren Hastings' Plan of 1772—Interference of English Government and Public Opinion—Policy of the Directors—Policy of Parliament—The Regulating Act—Provisions for Executive Government—For Legislation—For Establishment of Supreme Court—The Charter—Its Jurisdiction as a Common Law Court—As an Equity Court—As a Criminal Court—As an Ecclesiastical Court—As an Admiralty Court—Appeals from the Court to the Privy Council—Indefinite Terms of the Act and Charter—Relation of the Court to the Council—Powers of the Court, and Conduct of the Judges—The Result—Failure of the Court.

THE grant of the Dewanny was accompanied by ^{Grant of the Dewanny.} an imperial confirmation of all the territories previously held by the East India Company under grants from the Emperor. The Nizamut or administration of criminal justice was left in the hands of the Nabob, who received for its support and his own maintenance an annual grant of 53 lakhs of rupees. He thus recognized his dependence, and although the Nizamut remained in his hands, it was, or at any time might be, exercised under the control of the Company.

LECTURE
II.Its conse-
quences.

The Company thus became responsible for the collection of the revenue, and directly or indirectly for the due administration of civil and criminal justice. Nevertheless, for a period of six years, the latter duty was as a heavy and unproductive burden left in the hands of the Nabob: the criminal part belonging to the Nazim or military governor; the civil, to the Dewan or fiscal governor.* The result was that for a time the course of justice was suspended, the tribunals being without authority against the masters of the country.

Antecedent
position of
the native
Courts.

And "under the ancient government,"† says Mr. Mill, "the English, as well as other European settlers, instead of demanding payment from a reluctant debtor through the Courts of law, seized his person and confined it, till satisfaction was obtained. Nor was this so inconsistent with the spirit of the government as often to excite its displeasure. It was indeed a remedy to which they were not often obliged to recur, because the profit of dealing with them generally constituted a sufficient motive to punctuality. After the power of the English became predominant, the native Courts ceased to exert any authority over Englishmen and their agents." The loss of all title to independence, and the transfer to the Company of a right of ultimate control over those Courts, were not

* Mill's History of India, Vol. III, p. 363.

† *Ibid*, p. 370.

likely to increase their authority at least over Europeans. LECTURE II.

But, nevertheless, the administration for the most part of the revenues, and still more of civil justice, was conducted through native agency till the year 1772. The country in the neighbourhood of Calcutta, of Burdwan, Midnapore, and Chittagong was under the superintendence of the Company's European servants. But the remainder of the provinces, usually called the dewanny lands, were left under the immediate management of two native dewans, one stationed at Moorshedabad, and the other at Patna. It was not thought prudent, either by the local Government or by the Directors to vest the immediate management of the revenue or the administration of justice in the European servants. It is doubtful whether the Europeans at that time possessed sufficient knowledge of the civil institutions and the interior state of the country to qualify them for the trust.

A resident* at the Nabob's Court, who inspected the management of the Moorshedabad dewan, and an officer of similar position at Patna, who superintended the collections by a native of rank of the province of Behar, maintained an imperfect control over the civil administration of the Company's

Native agency in civil justice retained till 1772 under supervision.

The Company's supervision thereof.

* See 5th Report of Select Committee of House of Commons, dated 26th July 1812, and 2 Harington's Analysis, p. 2, note.

LECTURE
II.

grants ; while the zemindary lands of Calcutta and the 24-Pergunnahs, and the ceded districts of Burdwan, Midnapore, and Chittagong, which at an earlier period had been obtained by special grant from the Nabob of Bengal, were superintended by the covenanted servants of the Company.

Authority
of native
dewans.

Mohamed Reza Khan was the dewan at Moorshedabad, and Shitab Roy at Patna; and they had till 1769 almost exclusive direction of all details relative to the settlement and collections of the districts in Bengal and Behar, and therefore over the administration of civil justice ; under the superintendence at their respective head-quarters of a European resident.

Supervi-
sion
gradually
extended.

The work of supervision thus commenced was gradually extended until the Company was able to take into its own hands the work which it at first entrusted to the native authorities. In 1769 European local supervisors, in subordination to the two residents, were appointed; chiefly, no doubt, with a view to the revenue, but also in order to superintend the judicial administration.

In the next* year, 1770, two revenue Councils of control, with superior authority, were appointed, one at Moorshedabad, and the other at Patna. A severe famine raged in Bengal during that year, and led indirectly to the change of policy which at that

* 2 Harington's Analysis, p. 6.

time became visible, viz a more direct and close supervision than had previously been considered possible.

LECTURE
II.

With regard to criminal justice, that also was left in the hands of native authorities. Mahomedan criminal law was in force throughout the country, administered by Mahomedan Courts.

Native
agency in
criminal
justice
retained.

At first but little alteration was made in the existing system. The same law was continued in force, and the same tribunals were charged with its administration. In the Presidency town* the judicial authorities were:—1. The Nabob himself in all capital cases. 2. His deputy in cases of quarrels, frays, and abusive names. 3. The Foujdar in all cases not capital, judgment and sentence being passed by the Nabob. 4. The Mohtesil in all cases of drunkenness, selling spirituous liquors, &c. 5. The Cotwal, a peace officer of the night, dependent on the Foujdaree. In the provinces the zemindars exercised civil and criminal jurisdiction over their several districts. In capital cases they reported to the Nazim; in others they were practically uncontrolled.

The utter inefficiency of this system to ensure protection to life and property soon became manifest. It was probably impossible for the English at once to assume the duty of administering

* Beaufort's Criminal Digest, p. 4.

LECTURE

II.

criminal justice themselves, and the native Courts were without any authority, except such as they exercised by the sufferance of the dominant party. Those who had the power were obliged eventually to assume responsibility, and the first steps towards that end were gradually to undertake the work of supervision.

The Company's
anniversary
celebration
thereof.

Accordingly* in 1769 certain servants of the Company, under the title of supervisors, were stationed in appropriate districts throughout the country, for the purpose of exercising some control over the Native Courts.

These were also bound, I have before shown, to look after the revenue and the exercise of civil jurisdiction. And in 1770 two Councils at Patna and Moorshedabad, with superior authority, were established; mainly, it may be assumed, to protect the Company's pecuniary interests.

Change of
policy.

In 1771 the Directors declared their† resolution “to stand forth as Dewan and by the agency of the Company's servants to take upon themselves the entire care and management of the revenues.” This involved the entire remodelling of rights of property in the soil, and the assumption of the administration of justice. It expressed the policy which

* Beaufort's Criminal Digest, p. 4.

† Communicated in this letter to the President and Council at Fort William, dated 28th August 1771; see 1 Harington's Analysis, p. 8, note.

had already been determined upon, *viz.* to abandon the government through the Nabob's hierarchy of officials subject to English supervision; and to transfer to the Company's servants the direct discharge of the duties of administration.

The next event was that Warren Hastings was transferred from Madras to the Governorship of Bengal, where he landed early in 1772. The office of naib dewan was abolished, and the efficient administration of the internal government was at last undertaken by British agency;* though many years were yet to elapse before native agency could be dispensed with. Immediate measures were taken for the regular distribution of justice. A committee of circuit was appointed consisting of the Governor and four members of Council; the report of which was drawn up by Warren Hastings. It drew attention to the inefficiency of the Mahomedan law Courts then existing, and proposed a plan which was immediately adopted by the Government, under which Mofussil Dewanny Adawluts or Provincial Courts of Civil Justice superintended by Collectors of the Revenue were established in each district. These Courts took cognizance of all disputes, real or personal, all causes of inheritance, marriage, and caste, and all claims of debt, disputed accounts, contracts and demands of rent. Questions of succession to the zemindary and talookdaree property

LECTURE
II.

The Company undertake the administration of civil justice.

* 1 Harington's Analysis, p. 8.

LECTURE II. *were not submitted to these Mofussil or Collector's Courts, but were reserved for the decision of the Governor in Council.*

Also of
criminal
justice.

With reference to criminal jurisdiction, the Mahomedan law and Mahomedan officers of justice were continued, but the whole plan was changed. A Court of Criminal Judicature was established in each district, called a Foujdaree Adawlut. In it a Kazee and a Mooftee, with the assistance of two Moulvies, appointed to expound the law, sat to hold trials for all criminal offences.* The English Collectors of Revenue were however directed to superintend the proceedings of those Courts, to see that the necessary witnesses were summoned and examined; that due weight was allowed to their testimony, and that the decisions passed were fair and impartial.

Chief
Criminal
Court.

These Foujdaree Adawluts were placed under the control of a Sudder Nizamut Adawlut established at Moorshedabad. It was presided over by a darogah or chief officer, appointed by the Nizam. A chief Kazee, a chief Mooftee, and three Moulvies sat to assist him. The duty of the Court was † "to revise all the proceedings of the Foujdaree Adawluts; and in capital cases, by signifying their approbation and disapprobation thereof, with their reasons at large, to prepare the sentence for the warrant of the Nazim." An English committee of revenue was at

* See preamble to Regulation IX of 1793.

† Beaufort's Criminal Digest, p. 5.

first placed at Moorshedabad to control the proceedings of the Court, in order to prevent the perversion of the course of justice. The Court however was shortly after its establishment on its new basis removed to Calcutta to be more immediately under the superintendence of the President and Council; and the Committee, apparently, was then abolished. In 1775 the Court was removed back again to Moorshedabad, where it remained for 15 years, the Nazim having the entire control over the department of criminal justice.

Besides the Criminal Court of Appeal, a *Sudder Dewanny Adawlut* was also established, and, like the Criminal Court presided over by the President and Members of Council, assisted by native officers. It exercised appellate civil jurisdiction over the *Mofussil Courts* in all cases where the disputed amount exceeded Rs. 500. Chief Civil Court.

This was the general character of the scheme devised by the government of Warren Hastings, and it has often been warmly approved. The adoption of the policy indicated by that scheme, and the assumption of the direct responsibility of government in lieu of a mere plan of partial supervision of the Nabob's officers, has sometimes been called a dissolution of the double government instituted by Lord Clive. That is one way of regarding it; but on the other hand, the administration of justice was carried on in the name of the Nabob and by his officers for the next eighteen years. Character of Warren Hastings' plan of 1772.

LECTURE
II.

during fifteen of which the Chief Court of Criminal Appeal was stationed at Moorshedabad under his immediate control. It seems to me that it was merely intended to be a considerable step towards a reorganization of the country, and that Warren Hastings had as little intention to dissolve, as Lord Clive to found, a double government. Both of those statesmen recognized that all real authority was vested in the Company. Both for political reasons determined that the name and shadow of authority should remain with the Mogul and his lieutenant. Mahomedan law, law officers, and revenue officials were retained, but were gradually replaced by the Company's Regulations and servants. Seven years of supervision and inquiry, and greater knowledge of the country and its inhabitants, rendered it practicable to substitute the scheme of 1772 for the tax-gathering and partial supervision of the preceding years. The decisive step of bringing Warren Hastings to Calcutta, and of standing forth as dewan, both which measures proceeded from the Directors, may have been stimulated by a knowledge of what was passing in the public mind at home, and of the probable measures which Parliament might think necessary to adopt in order to discharge the duties of government which had been assumed and neglected.

Inter-
ference of
English
Govern-
ment and
public
opinion.

A variety of circumstances had tended to draw the attention of the English public to the state of Indian affairs. The general unpopularity of the

returned servants of the Company, their wealth and ostentation, attracted attention, and induced the public mind to believe that the sudden creation of this wealthy class was due to great crimes and great oppression. The strong prejudices thus excited served to strengthen the hands of a few English statesmen, amongst them conspicuously Edmund Burke, who had been roused by the tales of cruelty and oppression which had reached the public ear, and who determined to bring the authority of Parliament into action to restrain the excesses of their countrymen abroad, and to secure some measure of protection and good government to the territories which they had acquired.

In 1769 the East India Company disappointed with their expectations of profit, resolved to send three supervisors to India to control, and if necessary to supersede the authority of the President in Council. But, notwithstanding every attempt to evade the rights of the Crown, public opinion was gradually acquiring strength, and a committee of secrecy of the House of Commons was appointed in 1772 to carry out the general demand for investigation. As the result thereof, the Company was prevented from sending out the supervisors. Another apparent result was the rejection of a Bill brought into the House of Commons by Mr. Sullivan, for the due administration of justice in Bengal. Mr. Sullivan was Deputy Chairman of the Company, and the

Lacrust
 celebrated rival and antagonist of Lord Clive on the Board of Directors. According to its provisions, a new Court was to be established in Bengal, the Judges to be appointed by the Company, and all Christian persons were to have been subject to its jurisdiction, and to have been exempted from the Courts of the Nabob.* This project, which would have concentrated all judicial power in the hands of the Company, failed.

**Policy of
 Parliament.**

The English Government appear by this time to have determined to interfere directly with the authority of the Company, and to assume the exercise of the sovereign powers which had been conceded by the Mogul. With reference to the administration of justice, they were strengthened in their determination by the result of their enquiries.

For the committee of secrecy previously alluded to, reported in 1773, with reference to the Courts of Justice which had been established by the Mahomedan government in Bengal that, "so far as they were able to judge from all the information laid before them, the subjects of the Mogul empire in that province derived little protection or security from any of these Courts; and that in general, though forms of judicature were established and preserved, the despotic principles of the government rendered them the instruments of power rather

* See Governor Johnston's Speech, 30th March 1773, referred to in Sir Charles Grey's Minute.

† Harrington's Analysis, Vol. I., p. 27.

than of justice; not only unavailing to protect the people, but often the means of the most grievous oppressions under the cloak of the judicial character.”

LECTURE
II.
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Accordingly in the same year an important Act of Parliament was passed “for establishing certain Regulations for the better management of the affairs of the East India Company, as well in India as in Europe,” which has been commonly called the Regulating Act.* It recited the Charter which established the Mayors’ Courts, “which said Charter does not sufficiently provide for the administration of justice in such manner as the state and condition of the Company’s Presidency of Fort William in Bengal do and must require.” One subject with which the statute dealt was the constitution of the Governor-General’s Council.

The Regu-
lating Act.

The 7th and 8th Sections provided that the Government of Bengal should consist of a Governor-General and four Counsellors; but that in case of a difference of opinion, they should be concluded by the decision of the majority; in case of an equal division of Counsellors present, the Governor-General or senior Counsellor should have a casting voice, and his opinion be decisive and conclusive. By the 9th Section of the Act, the Presidents and Councils of Madras and Bombay were rendered subordinate to the Governor-General and Council of

Provisions
for Execu-
tive Go-
vernment.

* 13 Geo. III., c. 63.

LECTURE

II.

For legis-
lation.

Bengal who were thereby constituted the Supreme Government in India, subject, however, to the Court of Directors in England.

By the 36th Section that Supreme Government was empowered "from time to time to make and issue such rules, ordinances, and regulations for the good order and civil government of the said United Company's settlement at Fort William aforesaid, and other factories and places subordinate or to be subordinate thereto, as shall be deemed just and reasonable (such rules, ordinances, and regulations not being repugnant to the laws of the nation), and to set, impose, inflict, and levy reasonable fines and forfeiture for the breach and non-observance of such rules, ordinances, and regulations."

Such regulations, however, were not to be valid or of any force until they were duly registered in the Supreme Court, with the consent and approbation of the said Court. An appeal from a regulation so registered and approved lay to the King in Council, but the pendency of such appeal was not allowed to hinder the immediate execution of the law. The Government were bound to forward all such rules and regulations to England, power being reserved to the king to disapprove them at any time within two years.

The same Act also established the Supreme Court, leaving out the distinction of Christians, insisted upon by Mr. Sullivan, and placing in lieu thereof

as the only criterion of personal liability to the jurisdiction that of subjection to the British Crown. By Section 14, all who are "His Majesty's subjects" were made liable. The Judges were appointed by the Crown, and it was made a King's Court, and not a Company's Court.

The establishment of the Supreme Court was in fact the triumph of the party in England which desired greater intervention by the English Government and Parliament in Indian affairs and greater control over the Company's proceedings. The Company desired the establishment of a system of Courts which, from the highest to the lowest, should be under their own control. The intention of the dominant party apparently was to separate the judicial entirely from the executive branch of administration; and to reserve the former entirely to the Crown. They commenced with the establishment of a Supreme Court in Bengal, which apparently, it was hoped, would, with aid from England, in time draw into its own hands the whole supervision of inferior Courts, and the whole administration of justice.

The provisions of the Act which relate to the constitution of the Supreme Court are as follows :—The 13th Section empowered the King in Council by his Charter to establish the Court in Bengal, to consist of a Chief Justice and three Judges (*subsequently reduced to a Chief Justice and two Judges)

* See 22 Geo. III, Chap. 142, Sec. 1.

LECTURE
II

who were to be appointed by the Crown and to be barristers of England or Ireland of not less than five years' standing. By the same Section it was declared that the Supreme Court should have full power and authority to exercise and perform all civil, criminal, admiralty, and ecclesiastical jurisdiction; and to form and establish such rules of practice and such rules for the process of the said Court, and to do all such other things as shall be found necessary for the administration of justice and the due execution of all or any of the powers which by the said Charter shall or may be granted and committed to the said Court, and also shall be at all times a Court of Record, and shall be a Court of Oyer and Terminer and Jail Delivery in and for the said town of Calcutta and factory of Fort William in Bengal and the limits thereof, and the factories subordinate thereto.

The
Charter.

In pursuance of this Act, a Royal Charter, dated March 26, 1774, was granted, under which the Supreme Court of Calcutta was established, and continued to administer justice for the period of 88 years. The extent of the jurisdiction of that Court was defined by the 13th Clause of the Charter, which authorized it to try all actions and suits concerning trespasses, or injuries, or debts, or concerning any houses, lands, or other real or personal property in Bengal, Behar, or Orissa brought against the East India Company, the

Mayor, and Aldermen of Calcutta, and "against any other of our subjects who shall be resident within the said provinces, districts, or provinces called Bengal, Behar, and Orissa, or who shall have resided there, or who shall have any debts, effects or estate, real or personal within the same and against the executors and administrators of such our subjects, and against any other person who shall at the time of such action being brought, or at the time when such cause of action shall have accrued be or have been employed by, or be or have been directly or indirectly in the service of the said United Company or of the said* Mayor or Aldermen, or of any of our subjects."

The Supreme Court was also vested with jurisdiction to try any action or suit "against every other person or persons whatsoever, inhabitants of India, residing in the said provinces, districts, or countries of Bengal, Behar, and Orissa, upon any contract or agreement in writing entered into by any of the said inhabitants with any of His Majesty's subjects where the cause of action shall exceed the sum of Rs. 500, and when such inhabitant shall have agreed in the said contract that, in case of dispute, the matter shall be determined in the said Supreme

Its jurisdiction as a Common Law Court.

* There was a proviso added that the Court should not try any suit or action against any person who had never resided in Bengal, Behar, or Orissa, or against any person then resident in Great Britain or Ireland, unless the suit or action were commenced within two years after the cause of action arose, and the sum to be recovered was not of greater value than Rs. 30,000.

Lectures
II.

Court." The Charter also provided the mode in which the Sheriff of Calcutta and his successors should be for the future appointed ; and authorized them to execute all writs, summons, rules, orders, warrants, commands, and process of the Court, and to receive and detain in prison such persons as should be committed to him for that purpose by the Court and by the Chief Justice and Justices respectively, and the Charter also provided for the modes of execution, arrest on mesne process, and for sequestration of property.

As an
Equity
Court.

The Supreme Court was also constituted a Court of Equity as the Court of Chancery in England. It was also constituted a Court of Oyer and Terminer and Jail delivery for Calcutta and Fort William and the factories subordinate thereto, with power to summon grand and petit juries, and to administer criminal justice as in the Courts of Oyer and Terminer in England with jurisdiction over all offences committed in Bengal, Behar, and Orissa, by any subject of His Majesty or any person in the service of the United Company, or of any of the King's subjects.

As a
Criminal
Court.

As an
Ecclesiastical
Court.

The Court was also empowered to exercise ecclesiastical jurisdiction in Bengal, Behar, and Orissa towards and upon British subjects then residing in the same manner as it is exercised in the diocese of London, "so far as the circumstances and occasions of the said provinces or people shall admit or require"; and to grant probates and

administrations to the estates of British subjects LECTURE II
 dying within the said provinces. The Court was
 also empowered to appoint guardians of infants and
 of insane persons and of their estates.

It was also appointed to be a Court of Admiralty As an Admiralty Court.
 for the provinces of Bengal, Behar, and Orissa,
 “and all other territories and islands adjacent there-
 unto, and which are or ought to be dependent
 thereupon” with power to hear and determine all
 causes and matters, civil and maritime, and to
 have jurisdiction in crimes maritime, according
 to the course of the Admiralty in England.

In civil cases an appeal lay to the Privy Council in Appeals from the Court to the Privy Council.
 such manner and form and under such rules as were
 observed in appeals from plantations or colonies, or
 from the Islands of Jersey, Guernsey, Sark, and
 Alderney. In criminal cases power of appeal was
 also given, but subject to considerable restrictions.

Both the Act of Parliament and the Charter which
 was granted in pursuance of it, provided that the
 former Charter of the 26th of Geo. II. should become
 null and void, so far as the Mayor's Court in Fort
 William was concerned. Thus the Supreme Court
 was the only tribunal in the country, with the excep-
 tion of the Courts of Requests and a few inferior
 authorities which owed their existence to the English
 Crown. The Adawluts established under the plan
 of Warren Hastings derived their authority from
 the Company, whether acting under the powers

LECTURE
II.

derived from the Mogul, or as the *de facto* masters of the country.

Indefinite
terms of the
Act and
Charter.

Besides the inconveniences arising from political power being vested in a majority of council, instead of in a responsible governor, there were serious omissions, whether intentional or otherwise, in the provisions regarding the Supreme Court. Although the Act was intended to be the basis of a general settlement of Indian affairs, in a very few years its policy was entirely reversed, and its leading features swept away. The criticism of some later Judges of the Supreme Court upon it was "that* the Legislature had passed it without fully investigating what it was that they were legislating about ; and that if the Act did not say more than was meant, it at least said more than was well understood."

For instance, subjection to the English Crown was made the ground of liability to the jurisdiction of the Court. But "there was not," as Sir Charles Grey points out,† "either in the Statute or in the Charter, any declaration who are and who are not subjects, nor whether any of the territorial acquisitions amounted to an acquisition of the territory itself, or to anything more than powers to be exercised within territories of the Mogul, nor whether even Calcutta itself was so much within the

* See 5th Appendix to 3rd Report of Select Committee of the House of Commons, 1831, p. 1234.

† *Ibid*, p. 1143.

allegiance that persons born there would be natural-born subjects of the British Crown." Those questions which were all of the greatest importance were left doubtful to be decided by the Court, whenever they might arise. Subject to such decision, the jurisdiction given to the Court was,* "first, over all persons whatsoever during their residence in any British territory, possession, or factory within Bengal, Behar, or Orissa; secondly, over all natural-born subjects or others having indefeasibly the character of subjects of the British Crown; and over persons in their service within Bengal, Behar, or Orissa, whether the place in which they might be were a British territory, possession, or factory, or a place belonging to some Indian prince, but under the protection of the Company. The intention was to have secured to the Crown a supremacy in the whole administration of justice, but the provisions made were inadequate to the attainment of the object, and have been defeated."

Thus there were established in India two independent and rival powers, *viz.* of the Supreme Council and of the Supreme Court; the boundaries between them being utterly undefined, one deriving its authority from the Crown, and the other from the Company. For seven years the conflict between them raged. The Court issued its writs

Relation of
the Court
to the
Council.

* See 5th Appendix to 3rd Report of Select Committee of the House of Commons, 1831, p. 1234.

LECTURE
II.

extensively throughout the country, arrested and brought to Calcutta all persons against whom complaints were lodged, zemindars, farmers, and occupiers of land, whatever their rank or consequence in the country. Defaulters to the revenue were set at liberty on *habeas corpus*; the government of the Nabob, which still remained in the hands of the Company, the effective instrument for the administration of Criminal Justice was declared by the Court to be "an empty name, without any legal right, or the exercise of any power whatsoever;"* and the production in Court of papers containing the most secret transactions of government was insisted upon. The Court was charged with stopping the wheels of government by the technicalities of English law, and of effecting a total dissolution of social order.

Powers of
the Court,
and con-
duct of the
Judges.

Although it is impossible to defend the acts of the Judges, it must be remembered that their position was from the first antagonistic to the Council ; and that they carried out in India a scheme which had been prepared in England without adequate information or competent skill for the purpose of checking the excesses of administration and of re-establishing order on principles totally strange to the inhabitants. The essential character and object of that scheme was to weaken the power of the government by vesting it in the hands of a majority, and to plant

* Mill's History of India, Vol. IV, p. 223.

in its neighbourhood a Court, framed after the fashion of Westminster Hall and Lincoln's Inn, with jurisdiction over all its executive acts and a veto on all its legislation. This tribunal, vested with such extraordinary powers, and so ludicrously unsuited to the social and political condition of Bengal, was not merely to exercise a civil and criminal jurisdiction, wholly strange and repugnant to the Indian people : it might sit one day on its common law side and give judgment to a suitor, and on the next day might sit on its equity side, and restrain that suitor from proceeding to execution. It might on one side adjudge a man to be the absolute owner of property, and on the other side consign him to perpetual imprisonment if he did not, in his character of trustee, forthwith give it up to those beneficially entitled. In short, the whole system of English law and equity, with its rules and customs and process, handed down from feudal times, moulded during struggles between secular and ecclesiastical powers, between church and commonalty, between common law and civil jurisprudence ; which time alone had rendered endurable to the people amongst whom it had grown up, a people widely different in habits, character, and form of civilization from any to be found in the East, was introduced into India, not intentionally as a burden, but for its benefit and salvation.

The result was that the Court exercised large powers independently of government, often so as to

The result.

LECTURE
II.

obstruct it, and had a complete control over legislation. Political power was thus vested in Judges who had neither the responsibilities nor the machinery of government. Such a system could not endure under any circumstances. Although the Courts are independent of government in England ; both are absolutely subordinate to the Legislature, in which however the power of government predominates. To make the Legislature subordinate to the Court, instead of the Court subordinate to the Legislature, and at the same time to direct it to enforce a system of law utterly inapplicable to India, independently of or in opposition to the government, which was at the same time weakened by divisions purposely created appears to be the most destructive and pernicious policy that wit could devise. Although the judicial service should be independent of the executive, yet it must be subordinate to the Legislature, and legislation must be, if power and responsibility are to go together, the unfettered expression of sovereign authority, wherever that authority may reside, or from whatever source it be derived, whether from an electoral body or an absolute prince.

Failure of
the Court.

The plan of controlling the Company's government by the King's Court entirely failed. The tribunal came to be regarded by the Natives, for whose protection it was established, with the utmost abhorrence. The policy which shaped the

Regulating Act was, no doubt, well-intentioned, but it was rashly and ignorantly executed. None of the Parliaments of George III were remarkable for their wisdom; but it was reserved for the Parliament which sat in 1773 by its Colonial Customs Duty Act and its Regulating Act to throw the affairs of two hemispheres into confusion. It endeavored to rule America on the principle of parliamentary taxation, and to control the government of India by the operation of English law Courts. The result was that British power in the West was subverted, and in the East was for a time seriously endangered. The anarchy which ensued continued till the policy of the Regulating Act was reversed, and Indian society assumed the form which it retained till the Company and the Mogul empire vanished.

LECTURE III.

EARLY HISTORY: THE SETTLEMENT OF 1781.

Consequences of the Regulating Act—Political events immediately preceding it—The new Council—Its dissensions—First exercise of power by the Supreme Court—Character of its proceedings—Consequences thereof—Upon the Revenue and Civil Justice—Upon Criminal Justice—Proceedings of the Court against individuals—Proceedings of the Court against the authorities—Crisis of the disputes—Conduct of Parliament—Conduct of the Company—Conduct of the Judges—They did not exceed their jurisdiction—Act of 1781—Limits set to the jurisdiction of the Supreme Court—The Governor-General and Council excepted therefrom—English Law no longer applicable to Natives—Power to frame suitable process—Recognition of the Provincial Courts—Indemnity—The Settlement of 1781—Indefiniteness of the jurisdiction—Distinction between Presidency Towns and Mofussil perpetuated—Conclusion.

Consequences of
the Regulating Act.

THE Bengal Government and the English Parliament had thus in 1774, by their combined efforts, established a political and judicial system in the Lower Provinces. The events of the next seven years showed clearly that, whether from the antagonism of the local authorities, or from inherent faults, the provisions of the Regulating Act were unsuited to the wants of the country. Those events deserve some study and consideration, as they throw considerable light on the subsequent history and account for the crude and unsatisfactory condition in which the legislative and judicial institutions of the country have been placed, and from which they have not yet been entirely rescued.

Before the arrival of the Regulating Act, Mahomed Reza Khan and Shitab Roy, the two dewans of Moorshedabad and Patna, had been removed by the Governor from their positions of authority and trust. Nuncoomar, the celebrated Brahmin of Bengal, had for some time been the implacable enemy of the former, but had lately transferred his animosity to Mr. Hastings. The subjugation of the Rohillas, both as to its policy and the manner in which that policy was executed, gave rise to serious questions as to the conduct of the government.

LECTURE
III.Political
events
immediate-
ly preced-
ing it.

Mr. Hastings was named in the Act Governor-General, with Mr. Barwell, an experienced Indian Administrator as one of his Councillors, but three Englishmen, new to India and its politics, General Clavering, Mr. Monson, and Mr. Francis, were also appointed to outvote him in his own Council. Sir Elijah Impey, as Chief Justice of the Supreme Court, arrived, with three Puisne Judges, to exercise an immense and undefined civil and criminal jurisdiction. The majority of the Council took the government into their own hands, condemned and reversed the previous policy of the Governor-General; interfered in the affairs of Madras and Bombay, and in the intestine disputes of the Mahratta government. "At the same time* they fell on the internal administration of Bengal,

The new
Council.

* See Macaulay's *Essays*, Vol. III, p. 365.

**LECTURE
III.**

and attacked the whole fiscal and judicial system, a system which was undoubtedly defective, but which it was very improbable that gentlemen, fresh from England, would be competent to amend. The effect of their reform was that all protection to life and property was withdrawn, and that gangs of robbers plundered and slaughtered with impunity in the very suburbs of Calcutta.”*

Its
dissensions.

One result of the confusion thus introduced was that Nuncoomar, seeing that the power of the Governor-General was at an end, stood forth to accuse him of having been bribed to dismiss Mahomed Reza Khan and other offenders with impunity, and of having sold certain public offices. The notorious Francis, one of the most malignant and impracticable men that ever meddled with public affairs in England or in India, read the paper of accusation at the Council Board in presence of the Governor-General, and also a communication from Nuncoomar requesting to be heard in support of his accusation. The Governor-General refused to be confronted with an accuser at his own Council Board, and also to allow his Councillors to sit in judgment upon him. He accordingly dissolved the meeting and departed. The majority voted Clavering into the chair, called in Nuncoomar, and decided to go on with the charges. With dissensions of this grave character in the Executive

* For particulars, see Lectures VII and VIII.

Council, all government was practically at an end, and public affairs were at a dead lock. It is impossible to believe that, in any country but Bengal, cowed by disaster and decimated by famine, the footing of conquerors who governed in this spirit could have been maintained.

With the counsels of the executive thus divided and distracted, the Supreme Court first put forward its new authority ; and to the astonishment of the Natives, an executive government, armed with despotic power, was baffled and vanquished by a Court of Justice, which sat in the neighbourhood, and to which no executive or administrative functions had been assigned. In the history of Bengal, Courts had always been subject to the government, and were the instruments of its will and pleasure, alike in collecting revenue, inflicting punishment, and deciding disputes. Nuncoomar was supported by the whole force of the executive, and doubtless fancied himself secure. But he was suddenly arrested, and committed to the common jail, on a charge of having six years previously forged a bond. The Council protested and remonstrated ; but a jury of the Supreme Court convicted, and Nuncoomar was sentenced to be hanged, and was accordingly executed. He deserved his fate ; but in the machinations and intrigues which terminated so fatally for him, his miscalculations were due entirely to an utter incapacity to understand the nature of the new power

First exercise of power by the Supreme Court.

LECTURE
III.

which had been established in his country. His death showed to his countrymen that thereafter the possession of political power, and the support of the executive, were no protection against this new and powerful tribunal.

Although the trial of Nuncoomar was regarded with very different feelings by the two factions in the Council; yet in the long contest between the Council on the one side, and the Court on the other, it is remarkable that both sides were perfectly unanimous in every step that was taken. It was the one subject upon which Hastings, and Francis were in accord. In no country were two powers ever placed side by side so utterly irreconcilable and independent.

Character
of its pro-
ceedings.

The Court issued its writs against the zemindars of the country at the suit of private persons; zemindars were ordered to Calcutta; and if they neglected the writ, they were seized upon their estates, and forcibly brought up to the Presidency. They were there compelled to give bail, or else were consigned to the jail, which seems to have been a place unfit for the habitation of human beings, and were detained during the progress of the suit. Arrest to an Indian of rank is the deepest degradation, but the Supreme Court, as an English tribunal administering English law, did not take into consideration either the circumstances of the country or the feelings of the Natives to such a degree as

to abolish any rule of procedure and of law which it was established in order to administer. "And," says Mr. Mill,* speaking of the law and procedure as they existed at the time the Supreme Court was founded, "the language of that law, its studied intricacies and obscurities which render it unintelligible to all Englishmen who have not devoted a great part of their lives to the study of it, rendered it to the eye of the affrighted Indian a black and portentous cloud, from which every terrific and destructive form might at each moment be expected to descend upon him. Whoever is qualified to estimate the facility and violence with which alarms are excited among a simple and ignorant people, and the utter confusion with which life to them appears to be overspread, when the series of customs and rules by which it was governed is threatened with subversion may form an estimate of the terrors which agitated the Natives of India when the process of the Supreme Court began to operate extensively among them."

The absence of so many zemindars (an affidavit of any Native being sufficient to procure a writ) struck a serious blow at the collection of revenue.

Moreover, the Dewanny Adawlut were in the habit of enforcing claims for rent and revenue by a summary process. But the Supreme Court began

to interfere with their coercive process ; and their

Consequences
thereof.

Upon the
revenue
and civil
justice.

* Mill's History of India, Vol. IV, p. 270.

LECTURE III. writs of *Habeas Corpus* were an additional source of embarrassment to the members of Government. Their interference destroyed the authority of the Provincial Courts, and rendered the collection of revenue a thing almost impossible.

Upon
criminal
justice.

Again the whole administration of criminal justice was in the hands of the government of the Nabob, and carried out by its agency and authority. The Supreme Court declared that they would not recognize that government, and that their jurisdiction extended over all the dominions of the Nabob.

A summary is thus given of some of the proceedings of the Court* :—

Proceed-
ings of
the Court
against
individuals.

“Persons confined by the Courts of Dewanny Adawlut are collusively arrested by process from Calcutta, or removed by *Habeas Corpus* when the language is as unknown as the power of the Court. The process is abused to terrify the people ; frequent arrests made for the same cause ; and there is an instance of the purchaser of a zemindary near Dacca, who was ruined by suits commenced by paupers, suits derived from claims prior to his purchase, and who was at last condemned in considerable damages for an ordinary act of authority in his station. Hence the Natives of all ranks became fearful to act in the collection of the revenues. The renters and even hereditary zemindars are driven away, or arrested at the time of the

* Mill's History of India, Vol. IV, p. 237.

collections, and the crops embezzled. If a farm is sold, on default of payment, the new farmer is sued, ruined, and disgraced. Ejectments are brought for land decreed in the Dewanny Adawlut. A talookdar is ruined by the expense of pleading to the jurisdiction, though he prevails. And in an action when Rs. 400 were recovered, the costs exceeded 1,600 rupees. When to these abuses incident to the institution of the Court itself, and derived from distance and the invincible ignorance of the Natives respecting the laws and practice of the Court, we add the disgrace brought on the higher orders, it will not perhaps be rash to affirm that confusion in the provinces, and a prodigious loss of revenue, must be the inevitable consequence of upholding their jurisdiction. One zemindar upon pretence that he had been arrested, and afterwards rescued, has his house broken open, and even the apartments of his women rudely violated. Another zemindar surrenders himself to prison to avoid the like disgrace to his family."

Prosecutions were carried on by the Supreme Court against the Judges of the Revenue and Civil Courts for acts done in the regular performance of their business, and by these means the course of justice was entirely suspended. "Who are the Provincial Chief and Council of Dacca?" asked the Supreme Court in reference to the governing body of a great province. "They

Proceed-
ings of the
Court
against the
authorities.

LECTURE
III.

are no *corporation* in the eye of the law. The Chief and Provincial Council of Dacca is an ideal body. A man might as well say he was commanded by the King of the Fairies as by the Provincial Council of Dacca, because the law knows no such body." They held also that Native Magistrates who were appointed by the Provincial Councils to investigate cases, were liable in damages at the suit of every person affected by their proceedings.

In 1777, the Supreme Court entertained an action for trespass and false imprisonment against the dewan or principal officer of the Criminal Court at Dacca. The action was brought by a peon who had been convicted in that Court and imprisoned. The Supreme Court ordered the defendant to be arrested, that last disgrace to a Mahomedan of rank. The bailiff entered the house of the Judge, and attempted to seize the dewan. He was prevented, and thereupon attended by a crowd, he broke open the gate of the house, and in the affray the Judge was dangerously wounded. It ended by the Provincial Council giving bail for the dewan. "All criminal justice," said the Governor-General in Council, "is at a stand and seems not likely to be resumed. How can a Judge perform any function of his office? How presume to execute a criminal convicted and sentenced to death by the established laws of the government and his religion if he is liable himself to stand to actions of

damages, or to answer to a criminal accusation according to the laws of England for any punishment he may inflict?"

The action of the Court was thus directed to render the management of the territorial revenue and the administration of civil and criminal justice subject to the jurisdiction of the King's Court. The Governor-General and Council declared that, by the acts and declarations of the Judges, the Company's office of dewan was annihilated; the country government subverted; and they and their officers, acting under their authority, were threatened with the pains and penalties of high treason. The Judges asserted that their power derived directly from the Crown was greater than that of the Council which was derived from the Company, and that their duty was by the inherent force and vigor of English law to restrain the executive, and to protect the Natives.

So general was the sense of oppression and insecurity that, in the Province of Behar, the farmers and land owners petitioned the Governor in Council, praying for protection against the process of the Supreme Court, or if that could not be granted, for leave to relinquish their farms that they might retire into another country.

The case in which the disputes reached a crisis was this. In 1779 the Rajah of Cossijurah ^{Crisis of the disputes.}

LECTURE
III.

absconded to avoid the execution of a writ of the Supreme Court. Another writ was issued to sequester his land and effects. Sixty men, headed by a serjeant of the Court, were sent to execute it. The Rajah complained that they entered his house, beat and wounded his servants, broke open and forcibly entered his zenána, stripped his place of religious worship of its ornaments, and prohibited his farmers from paying their rents. The Governor-General and Council instructed the Rajah not to obey the process of the Court, and ordered the troops to intercept the party of the Sheriff, and to detain them in custody till further orders. The Government also issued a notification to all zemindars and others in the three provinces that, except in the two cases of their being British servants, or bound by their own agreement, they were not to obey the process of the Court. The Supreme Court took proceeding against the Company's attorney and the officers who seized the Sheriff's party. The attorney was thrown into prison, and finally the Governor-General and Council were at last individually served with a summons at the suit of the decree-holder, whose process of execution they had disturbed. They declined to appear, and a petition, signed by the principal British inhabitants in Bengal, went home to Parliament against the exercise which the Supreme Court was making of its power.

The rule of the Supreme Court is described by* LECTURE
III.
—
 Lord Macaulay as a reign of terror; "of terror heightened by mystery; for even that which was endured was less horrible than that which was anticipated. No man knew what was next to be anticipated from this strange tribunal; it came from beyond the black water, as the people of India with mysterious horror called the sea; it consisted of Judges not one of whom was familiar with the usages of the millions over whom they claimed boundless authority. Its records were kept in unknown characters; its sentences were pronounced in unknown sounds.

* * * No Mahratta invasion had ever spread through the province such dismay as this inroad of English lawyers, all the injustice of former oppressors, Asiatic and Europeans, appeared as a blessing compared with the justice of the Supreme Court."

This unexampled scene was the direct and inevitable result of the legislation which sought by introducing an offshoot from Westminster Hall in an unknown country, with a form of civilization, religion, and habits which were inflexible from their age, and utterly strange to the English Parliament, to re-establish society with the aid of a foreign and totally inapplicable class of laws. The statesmen who adopted this policy, and framed the Regulating Act, were chiefly responsible for the consequence. The accusations which, in the bitterness of those times, were

Conduct of
Parlia-
ment.

* Macaulay's Essays, Vol. III, p. 388.

LECTURE
III.

levelled against the Judges seem to have been disapproved. They were the ministers of a system, carrying out the objects and purposes of their judicial existence.

Conduct
of the
Company.

No doubt, all the Supreme Courts were directed by their charters to accommodate their process to the circumstances of the people and the country. This was done to some extent, but it must be remembered that to do so successfully required more co-operation and support from the executive than the Court was likely to obtain or did in fact meet with. It excited and undoubtedly experienced great opposition from the servants of the Company.* The first obstacle which it encountered was the upholding of the Nizamut under the Nabob and his Native officers in a state of complete independence of it. The Chief Court of the Nizamut was transferred from Calcutta to Moorshedabad immediately after the Court began to exercise its powers. Probably, if Mr. Sullivan's Bill had passed, the Company would have brought the whole of the Native Courts into subordination to the Court established by it. And when the Supreme Court was substituted, the jurisdiction, similar to that of the King's Bench which was given to it, indeed its very title and the objects of the whole charter, showed that it was supposed there would have been inferior

* Sir C. Grey's Minute, see 5th Appendix to the Third Report of the Select Committee of the House of Commons (1831), p. 1145.

Courts subjected to its superintendence. A system, correspondent to such intentions, could not have been established without the cordial co-operation of the Governor-General and Council of the time, and probably it ought not to have been attempted but by very slow and cautious steps, and supplementary enactments must have been made for securing the Hindus and Mahomedans against an abrupt demolition of their customs and usages. But instead of any preparations of such a tendency, all things were maintained in a posture rather of opposition than merely of separation. It may be said therefore, in justification of the Judges, that there was not that co-operation which they had expected from the Government; that the re-establishment in 1775 of the Nizamut at Moorsheadabad in its old form, was not a symptom of any inclination to promote that subordination of the Provincial Courts, which was looked for, and which would have been gradually accomplished, if the Supreme Court had been a Court of the Company.

And further, in criticizing the conduct of the Judges, some allowance must be made for the novelty of their position and their consequent ignorance of their relative and absolute duties. They were English lawyers sent out expressly to administer English law; they had been educated in a belief of its comprehensiveness and perfection.* “They

Conduct of
the Judges.

* Mill's History of India, Vol. IV, p. 242.

LECTURE
III.

knew nothing of India, had never heard of Hindu or Mahomedan law, and would have despised it if they had: they had been accustomed to know that gross abuses of law and justice prevailed in India, and they imagined it to be their first of duties to show that they would resolutely exert the powers which they thought that they possessed, for the extension of the principles of the only law which they conceived to be capable of protecting the interests of society. That they entertained a mistaken opinion of their own dignity and an equally unfounded contempt for the Company's functionaries originated in the same cause, and to ignorance may be referred the origin of their indiscretion and intemperance."

No doubt at the time great passions and animosity were excited, and charges were made against the Judges of exceeding their jurisdiction, and against Sir Elijah Impey in particular of gross dereliction of duty. But these charges will not bear examination; and the personal question in these days readily yields to the interest of the political situation.

They did
not exceed
their juris-
diction.

And with regard to exceeding their jurisdiction, that charge also in general cannot be sustained. The Act of 1781 was passed, not because the jurisdiction had been exceeded, but because it had been found difficult to exercise it without conflict with the Provincial Courts and the Government; in short,

because the Act of 1773 had proved to be a ruinous mistake. The 28th Section provides indeed an indemnity for the Governor-General in Council and the Advocate-General, for their transgressions of the law in opposition to the Judges, but no such indemnity will be found to have been granted or required for the Judges themselves. Parliament, no doubt, felt that the Act had been a failure, not because it had been misapplied, but because it was wholly inapplicable and unsuited to the wants of the country.

The Act of 1781 was passed to explain and amend the Act of 1773, "and for the relief of certain persons imprisoned at Calcutta under a judgment of the Supreme Court; and also for indemnifying the Governor-General and Council and all officers who have acted under their orders or authority in the undue resistance made to the process of the Supreme Court." It recited that doubts and difficulties had arisen with regard to the provisions of the Act of 1773, and the charter which had been issued under it and that "by reason thereof dissension hath arisen between the Judges and the Governor-General and Council and the minds of many inhabitants subject to the Government have been disquieted with fears and apprehensions, and further mischief may possibly ensue from the said misunderstandings and discontents if a seasonable and suitable remedy be not provided." And then the

LECTURE
III.

preamble proceeded, "whereas it is expedient that the lawful government of the provinces of Bengal, Behar, and Orissa, should be supported, that the revenues thereof should be collected with certainty, and that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights, and privileges."

Limits
set to the
jurisdiction
of the
Supreme
Court.

It was expressly declared by that Act that the Supreme Court should not have or exercise any jurisdiction in any matter concerning the revenue or concerning any acts ordered or done in the collection thereof according to the practice or usage of the country, or the regulations of the Governor-General and Council. Further, it was declared that no person should be subject to its jurisdiction by virtue of possessing any interest in, or authority over, lands or rents within the Provinces of Bengal, Behar, or Orissa, or by reason of his becoming security for the payment of such rents. *Employment of a person, directly or indirectly by the Company, or the Governor-General and Council, or by a native of Great Britain, was declared not to subject such person to the jurisdiction of the Court in any matter of inheritance or succession to lands or goods, or in any matter of dealing or contract between party or parties, except in actions for wrongs or trespasses, and also except in any Civil suit by agreement of parties in writing to submit the same to the decision of the said Court. Further, no action for wrong or

injury should lie in the Supreme Court against any person whatsoever exercising a judicial office in the country Courts for any judgment, decree, or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court.

LECTURE
III.

The former Act had declared the Supreme Court incompetent to hear, try, or determine any indictment or information against the Governor-General or any of the Council for the time being for any offence not being treason or felony which such Governor or any of his Council should be charged with having committed in Bengal, Behar, or Orissa. The Governor-General and Council and Chief Justice and Judges were declared not to be liable to arrest or imprisonment upon any action, suit, or proceeding in the Court. The later Act declared that the Governor-General and Council should not be subject jointly or severally to the jurisdiction of the Supreme Court "for or by reason of any act or order, or any other matter or thing whatsoever counselled, ordered, or done by them in their public capacity only and acting as Governor-General and Council." It was also provided that persons impleaded civilly or criminally in the Court for any acts done by the order of the Governor-General and Council in writing might plead the general issue, and give the said order in evidence, which order with proof that the acts done were done according to the purport of the same, it was provided should

The
Governor-
General
and Council
excepted
therefrom.

LECTURE
III.

amount to a sufficient justification of the said acts.

There was however, a proviso that, with respect to such orders of the said Governor-General in Council as should extend to any British subject or subjects, the Court should have and retain as full and competent jurisdiction as if the Act had never been passed.

English law
no longer
applicable
to natives.

With reference to the inconveniences which had arisen from applying English law to the Natives, the Supreme Court was, by the 17th Section of the new Act, empowered to hear and determine in such manner as was provided for that purpose in the charter all actions and suits against the inhabitants of the city of Calcutta: provided that their succession and inheritance to lands, rents, and goods, and all matters of contract and dealing between party and party should be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos by the laws and usages of Gentoos; and where only one of the parties should be a Mahomedan or Gentoos by the laws and usages of the defendant. And in order that regard should be had to the civil and religious usages of the Natives, it was enacted that the rights and authorities of fathers and masters of families, according as the same might have been exercised by the Gentoos or Mahomedan law, should be preserved to them; "nor shall any acts done in consequence of the rule and law of caste respecting

the members of the said families only be held and adjudged a crime, although the same may not be held justifiable by the laws of England."

LECTURE
III.

It was also provided that the Supreme Court might frame such process and make such rules and orders for the execution thereof in suits, civil or criminal, against the Natives of the presidency as might accommodate the same to the religion and manners of the Natives, so far as the same might consist with the due execution of the laws and attainment of justice. Such rules and orders were to be subject to the royal approbation, correction, or refusal.

Power to
frame
suitable
process.

But, perhaps, the most important part of the Act, and the one which most completely reversed the policy and intention of the Act of 1773, was the recognition by Parliament of the Civil and Criminal Provincial Courts, existing independently of the Supreme Court; and of the Governor-General and Council, or some Committee thereof, as the Chief Appellate Court of the country, and the vesting the Council with the power to frame Regulations for those Provincial Courts independently of the Supreme Court. The Sections are as follows:—

Recogni-
tion of the
Provincial
Courts.

Section 21.—And whereas the Governor-General and Council, or some Committee thereof, or appointed thereby, do determine on appeals and references from the country or Provincial Courts in civil causes be it further enacted that the said Court

LECTURE
III.

shall and lawfully may hold all such pleas and appeals in the manner and with such powers as it hitherto hath held the same, and shall be deemed in law a Court of Record; and the judgments therein given shall be final and conclusive; except upon appeal to His Majesty, in civil suits only, the value of which shall be £5,000 and upwards.

Section 22.—And it is hereby further enacted that the Court aforesaid shall and is hereby declared to be a Court to hear and determine on all offences, abuses, and extortions, committed in the collection of revenue, or of severities used beyond what shall appear to the said Court customary or necessary to the case, and to punish the same according to sound discretion, provided the said punishment does not extend to death or maiming, or perpetual imprisonment.

Section 23.—And it is hereby enacted that the Governor-General and Council shall have power and authority from time to time to frame Regulations for the Provincial Courts and Councils; and shall, within six months after the making the said Regulations, transmit, or cause to be transmitted, copies of all the said Regulations to the Court of Directors and to one of His Majesty's Principal Secretaries of State; which Regulations His Majesty in Council may disallow or amend, and the said Regulations, if not disallowed within two years, shall be of force and authority to direct the said Provincial Courts

according to the tenor of the said amendment, provided the same do not produce any new expense to the suitors in the said Court. LECTURE
III.
—

The Act also declared that no action should lie Indemnity. in the Supreme Court against any judicial officer in the country Courts in respect of any judgment or order of his Court, nor against any person for any act done in pursuance of such order; it being considered "reasonable to render the Provincial Magistrates, as well Native as British subjects, more safe in the execution of their office."

And finally, with regard to the indemnity in respect of the hostilities which had been carried on between the Court and the Council wherein said the Act, "many things have been done not justifiable by the strict rule of the law;" it was enacted that the Governor-General and Council and Advocate-General and all persons acting under their orders, so far as the same related to the resistance to any process of the Supreme Court from January 1, 1779, to January 1, 1780, were thereby indemnified, discharged, and saved harmless from any action, suit, or prosecution whatsoever on account of the said disobedience and resistance to the execution of the orders of the Court.

Thus within eight years the main provisions of the Regulating Act were swept away. The Supreme Court, however, continued to exist, and ultimately, with its diminished powers and pretensions, won The
Settlement
of 1781.

LECTURE
III.

its way to greater authority and respect, both from Europeans and Natives, than any other tribunal which has ever existed in India. Nothing, however, in its subsequent history serves to justify or excuse the policy of its founders. Their attempt to introduce an English superintendence of law and justice on the part of the Crown, and an administration of English rules of law and equity by an English Court, modelled according to English fashion, were made rashly and ignorantly, without any sufficient scheme or due preparation; without any measures being taken to ensure the co-operation of the local authorities, but on the contrary with every attempt to impose upon them a policy to which they were opposed, and which they were determined to subvert.

Indefinite-
ness of the
jurisdic-
tion.

But in the Act of 1781, as in that of 1773, there is no plain statement of the relation in which the Indian territories stood to the British Crown, nor whether any Indian natives were to be comprehended under the term "subjects," nor whether* the Provincial Courts were to have a concurrent jurisdiction with the Supreme Court, or an exclusive one; nor, if the latter, what were to be the limits of it. The phrase "British subjects" is used in both Acts in such a way as necessarily to exclude from its meaning the Hindu and Mahomedan inhabitants; but, it is so used that, with respect at least to subjects not being natives of Great Britain or

* Sir C. Grey's Minute.

India, subsequent glosses made it almost impossible to affix any definite understanding to it.

LECTURE
III.

The result of the two Acts has been that the distinction between Presidency Towns and Mofussil which originated in the distinction between the Company's factories and the Mogul territory has been perpetuated. At the distance of nearly a century, it still exists. The influence of the Presidency Town system has, since the Act of 1781, been but thinly scattered over the Mofussil, and the disputes and inconveniences which have arisen have been temporary and occasional. But there cannot be any sufficient reason for continuing the distinction any longer. The last relics of the old Supreme Court powers must before long be removed, and the authority which the High Court derives as its successor by analogy to the jurisdiction of the Queen's Bench be placed, so far as it is necessary to retain it, upon the definite and well-ascertained footing of an Anglo-Indian Act.

Distinction
between
Presidency
towns and
Mofussil
perpetuated.

The Act of 1781 at all events settled the difficulties which had arisen under the Regulating Act, and the settlement, crude and unsatisfactory as it was, was copied in the other Presidencies, and endured so long as the Company and the Mogul Emperor existed.

In Bengal a revised Code was issued in the same year as this important Act. Very little legislation had been effected under the Regulating Act; though, under the Act of 1781, a large body of Regulations

Conclusion.

LECTURE
III.

continued to be passed for half a century. Thus the Act of Parliament, the Revised Code, the Parliamentary recognition of the Sudder and Provincial Courts, the grant of legislative authority apart from the veto of the Supreme Court, the restriction of the powers of that Court, and the declaration of the right of Hindus and Mahomedans to their own laws and usages were effected in 1781. A complete settlement was made sufficient to form the foundation of the Indian polity for three generations, and to mark the commencement of a new era in Indian History.

In that era the Supreme Court acquired authority and renown; and English lawyers in India have laid the foundations of a complete system of Anglo-Indian jurisprudence. They have carried out the ultimate end and object of the Regulating Act—an object which has redeemed the character of the Statute and of its immediate policy—*viz.* to teach both rulers and subjects in the East that respect for law which is the foundation of social order and the greatest gift which England has had ~~it~~ in its power to bestow on India. The angry opposition which has been at times excited has died away, and as India is now united under a monarchy which is itself limited by law, and is settling down, even in its farthest provinces, into a law-governed country the wishes of the authors of the Regulating Act which they so utterly failed to accomplish may be said to have been ultimately fulfilled.

I shall now trace separately the history of the legislative authorities which have from time existed throughout India, of the Supreme Courts and other judicial authorities established in the Presidency Towns, and of the Civil and Criminal Courts of the country. In eighty years we shall arrive at a new epoch, the date from which nearly all existing legislative and judicial authority derives its origin.

LECTURE IV

THE LEGISLATIVE COUNCILS.

Two-fold power of legislation given—Extent of the first power—Extent of the second—Excessive exercise of the powers—Parliamentary recognition thereof—Mode of exercising legislative power prescribed—Legislative power at Madras—At Bombay and Madras—At Bombay—Extent of the power—Extension of legislative authority in 1813—Power of taxation—Sanction of Directors necessary—Jurisdiction of the legislature—Regulations to be laid before Parliament—Reservation of Sovereignty of the Crown—Power to make Articles of War—Customs—Power to alter the revenue and impose new taxes—Statute Law in 1834—Necessity for reform in the legislature—The Act of William the Fourth—Provisions relative to legislation—Indian Law Commissioners—Local legislatures superseded—Articles of War—Conclusion.

Two-fold
power of
legislation
given.

I HAVE already described the extent of the legislative power granted by Parliament to the Company during the early period which preceded the passing of the Regulating Act. The most important exercise of that power, whether within or in excess of its terms it is unnecessary now to enquire, occurred in 1772. In that year the President* and Council of Bengal made and ordained certain general regulations for the administration of justice, by virtue of which certain Courts, both Civil and Criminal, such as have already been described, were established

* See Colebrooke's Supplement to the Digest of Regulations, Vol. III, p. 1.

throughout the Lower Provinces of Bengal, with certain definite rules of procedure and law.

The Act of 1773 defined the extent of the legislative authority of the Governor-General and Council, and placed it under the supervision and subject to the veto of the Supreme Court. No enactments of any importance were passed till 1780, when the Governor-General and Council, considering that important changes had taken place in the constitution and Civil Government of those provinces since 1772, passed certain regulations* for the more effectual and regular administration of justice in the provincial Civil Courts. Those Regulations were to be considered binding only till a new arrangement should be made by authority of Parliament.†

Later in the same year it confirmed and amended all existing regulations respecting the Sudder and Provincial Courts. And early in 1781 a Revised Code was issued.

These must be taken to have been passed in pursuance of the legislative power granted by the Regulating Act. They are not expressed to be registered in the Supreme Court and probably were not so registered.

But in 1781 the new Act of Parliament empowered the Governor-General and Council to frame

* See Colebrooke's Supplement to the Digest of Regulations, Vol. III, p. 14.

† *Ibid*, p. 22.

LECTURE
IV.

Regulations for the Provincial Courts, without reference to the Supreme Court. It was under that authority that the Government preferred to act. But they were unable to pass any Regulation which the Supreme Court was in any way bound to recognize, unless it was previously registered as directed by the Act of 1773.

Extent of
the first
power.

The Supreme Council, therefore, had from the first a two-fold power of legislation conferred by two separate Acts of Parliament. The one enabled them to make laws for the good order and civil government of the settlement at Fort William and all factories and places subordinate thereto, and to make any Regulations not repugnant to the laws of the realm, and to enforce them by reasonable sanctions; but the exercise of the power was subject to the supervision of the Court. It has been said that the power so conferred was intended to apply only to Calcutta and its dependent factories, into which English law had already been introduced, and not to what are in that Act described as the territorial acquisitions of Bengal, Behar and Orissa. But the Act does not appear to have been so understood; and the large body of regulation law mentioned above was framed in pursuance of its powers for the benefit of the provinces.

Extent of
the second.

The second power of legislation was derived from the Act of 1781 by which the Governor-General

and Council or some Committee thereof or appointed thereby was empowered as a Court of Record to determine on appeals or references from the country or Provincial Courts in civil causes ; and from time to time to frame Regulations for the Provincial Courts and Councils. Copies of such Regulations were to be transmitted within six months to the Court of Directors and to the Secretary of State, and if not disallowed within two years, were to be of force and authority to direct the Provincial Courts. Power to disallow or amend such Regulations was reserved to the Sovereign in Council. It was under this Act that, notwithstanding the limited purpose it professed to have in view, most of the Regulation law was passed. The Supreme Court had no power of supervision or of veto in reference to any enactments passed in pursuance of this statute, and in consequence the Council preferred to legislate under its provisions in preference to those of the earlier Act. But the Court on the other hand was not in terms nor in effect bound by any Regulations which were not duly registered by them.

Registration of laws in the Supreme Court or in any Court of Justice was rendered unnecessary by the Act* of William IV passed in 1833.

The Regulations passed in pursuance of the authority granted in 1781 were doubtless far in Excessive exercise of the powers.

* 3 & 4 Wm. IV, c. 85, s. 45.

LECTURE
IV.

excess of the legislative power, having regard to the precise terms in which it was granted. But after several years of its exercise, Parliament itself* referred to that power as if it were one of making a regular Code affecting the rights, persons, and property of the Natives and others amenable to the Provincial Courts. That was a Parliamentary recognition of the power which the Indian Council had assumed to exercise. The Council, regardless of the limited extent of its legislative authority, had passed numerous Regulations; and in 1793 collected and passed them in the shape of a Revised Code.

Parliamentary
recognition
thereof.

The Act of Parliament† to which I have just alluded was passed in 1797. It recited that various Regulations for the better administration of justice among native inhabitants and others within the Provinces of Bengal, Behar, and Orissa were from time to time framed by the Governor-General in Council in Bengal. Amongst other things it appeared to have been established and declared as essential to the future prosperity of the British territories in Bengal that all Regulations passed by Government affecting the rights, properties, or persons of the subjects should be formed into a regular Code, and printed with translations in the country languages, and that the ground of every Regulation should be prefixed to it. The Governor-General in Council

* See 37 Geo. III, c. 142, s. 8.

† *Ibid.*

had also enacted that the Courts of Justice within the Provinces should be bound to regulate their decisions by the rules and ordinances which such Regulations might contain; whereby the native inhabitants might be made acquainted with the privileges and immunities granted to them by the British Government, and the mode of obtaining speedy redress for any infringement thereof. Parliament referring to these proceedings considered that it was essential that so wise and salutary a provision should be strictly observed, and that it should not be in the power of any Governor-General in Council to neglect or dispense with it for the future.

Accordingly* it was enacted that all Regulations which should be issued and framed by the Governor-General in Council at Fort William in Bengal affecting the rights, property, or persons of the Natives, or of any other individuals who might be amenable to the Provincial Courts of Justice (thereby recognizing the full extent of the legislative authority which had been exercised), should be registered in the Judicial Department, and formed into a regular Code, and printed with translations in the country languages, and that the grounds of each Regulation should be prefixed to it. And all the Provincial Courts of Judicature were thereby directed to be bound by and to regulate their decisions by such rules and ordinances

Mode of
exercising
legislative
power
prescribed

* See 37 Geo. III, c. 142.

LECTURE
IV.

as should be contained in the said Regulations. The Governor-General in Council was directed annually to transmit to the Court of Directors ten copies of such Regulations as might be passed in each year, and the same number to the Board of Commissioners for the Affairs of India. By this Act, therefore the legislative power of the Governor-General, independently of the Supreme Court, was recognized and confirmed, and endeavors were made to place it under control. It was not, however, the first endeavor to place the legislative power in India under some restrictions; for George the First's Charter had reserved to the home authorities a power of supervision. But at this time a formal publication, a written record of reasons for resorting to particular enactments, and official communication of their contents to the authorities in England were deemed to be necessary expedients for placing a check on any hasty exercise of power.

Legislative
power at
Madras.

The legislative power being thus firmly planted in Bengal it next became necessary to establish a similar authority in the other Presidencies. Accordingly in the year 1800 the Governor* and Council of Fort St. George at Madras were invested within the territories subject to their government with the same legislative power as had previously by the Act of 1781 been given to the Governor-General and Council of Fort William, that is, they were

* See 39 & 40 Geo. III, c 79, s. 11.

empowered to frame Regulations for the Provincial Courts and Councils annexed to that Presidency. LECTURE
IV.

Again in 1807 an Act* was passed amongst other things "for the better government of the settlements of Fort St. George and Bombay." It recited the expediency of granting to the two local Governors in Council the same powers of government within their respective territories as were vested in the Governor-General and Council for the government of the Presidency of Fort William. It accordingly empowered them respectively "from time to time, respecting ordinances, to make, frame, and issue such rules and regulations for the good order and civil government of the Towns of Madras and Bombay respectively, and of the said Company's settlements at Fort St. George and Bombay, and other factories and places subordinate or to be subordinate thereto respectively," and to add the necessary sanctions thereto as the Governor-General in Council might make for the good order and civil government of Fort William. "Nevertheless," the Act proceeded "such rules, ordinances, and regulations to be made by the said Governor in Council of Fort St. George shall not be valid or of any force or effect until the same shall be duly registered and published in the Supreme Court of Judicature of Fort St. George in like manner, and within such time as the rules, ordinances, and regulations

At Bombay
and
Madras.

* 47 Geo. III, sess. 2, c. 68.

LECTURE
IV.

to be made by the said Governor-General in Council of Fort William are, by any Act or Acts now in force, required to be registered in the Supreme Court at Fort William; nor shall the rules, ordinances or regulations to be made by the Governor in Council of Bombay be valid or of any force or effect until the same shall be duly registered and published in the Court of the Recorder of Bombay in like manner and within such time as aforesaid." Such regulations were to be subject to appeal as provided by existing Acts of Parliament.*

At Bombay. The Governor in Council at Bombay was also empowered to frame regulations for the Provincial Courts and Councils within his territories and provinces "in like manner and subject to all the regulations, provisions, and confirmations touching the same as the Governor-General and Council at Fort William are, by any Act now in force, authorized and empowered to do for the better administration of justice among the native inhabitants and others being within the Provinces of Bengal, Behar, and Orissa."

Extent of
the power.

As these Acts were later than the Act of 1797, it might reasonably be considered that the local Governor and Councils had legislative powers conferred on them, not as defined by the Acts of 1773 and 1781, but as recognized and confirmed by the Act of 1797.

* Vide 13 Geo. III, c. 63; and 39 & 40 Geo. III, c. 79.

It does not appear that the Governor-General exercised any direct authority over the Governors in Council at Madras or Bombay in the matter of making laws. It had control over them in political matters under the Act of 1773, and in revenue matters and all cases whatever under the Act of 1797. A copy of every Regulation passed at Madras and Bombay was sent to the Governor-General in Council; but it does not appear that it was submitted for approval before being passed. The legislative powers of the Governor-General's Council were confined by the terms of its constitution and in practice to the Presidency of Bengal.

In 1813 the legislative power so conferred on all three Councils was extended, and at the same time placed under still greater control. The Governor-General and the Governors in Council in their respective Presidencies, with the sanction of the Court of Directors and the Board of Commissioners, were empowered by an Act* passed in that year to impose duties and taxes within the towns of Calcutta, Madras, and Bombay; for the enforcing of which taxes, Regulations were directed to be made by the Governor-General and Governors in Council in the same manner as other Regulations were made, that is, in a two-fold manner; under the Act of 1773, or under that of 1781. The provisions of the Act were as follows:—

Extension
of
legislative
authority
in 1813.

Power of

* 53 Geo. III, c. 155, ss. 98, 99, and 100.

LECTURE
IV.Sanction
of
Directors
necessary.

First, it was provided "that no new or additional imposition of any duty or tax upon the export, import, or transit of any goods, wares, or merchandise whatsoever, made or to be made by authority of the Governor-General or Governor in Council of any of the said Company's Presidencies or settlements in the East Indies or parts aforesaid, shall be valid or effectual until the same shall have been sanctioned by the Court of Directors of the said United Company, with the approbation of the said Board of Commissioners; which sanction and approbation shall be signified to the said Governments respectively by some public despatch from the said Court of Directors, describing each Regulation for the purposes aforesaid, which shall be so sanctioned and approved, by its title at full length, and expressing that the same is so sanctioned and approved; and all such Regulations, when promulgated in the East Indies by the said Governments, shall contain express mention that the same are made with the sanction of the said Court of Directors, and with the approbation of the said Board of Commissioners for the affairs of India; and such mention shall be taken as conclusive evidence of such sanction and approbation in all Courts of Justice."

Jurisdiction
of the
legislature.

Secondly, in the same Act,* it was further provided that all persons who should proceed to the East Indies

* Section 35.

should, upon their arrival at any place within the limits of the United Company's Government, be subject to all such Rules and Regulations as then were or thereafter might be in force within those limits.

LECTURE
IV.

And in addition to the rule which had compelled the Indian Government to forward to the authorities in England copies of all Regulations passed, it was then enacted* that copies of legislative Regulations, made by the several Governments of India, and required by various Acts of Parliament to be sent home, should be annually laid before Parliament.

Regulations to be laid before Parliament.

Section 95 of the same Act enacted "that nothing in this Act contained shall extend or be construed to extend to prejudice or affect the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the said territorial acquisitions."

Reservation of Sovereignty of the Crown.

Section 96 recited that doubt had been entertained whether the several Governments of the Company had sufficient power in all cases to make Laws and Regulations and Articles of War for the order and discipline of officers and soldiers being natives of the East Indies or other places within the limits of the said Company's Charter, in the service of the said Company; and for the administration of justice by Courts Martial to be holden upon such officers and soldiers. It was accordingly enacted that

Power to make Articles of War.

* *Vide* Section 66.

LECTURE
IV.

the several Governments of Fort William, Fort St. George, and Bombay "may and shall, during the continuance of the term hereby granted to the said Company, be deemed and taken to have full power and authority to make all such Laws and Regulations and Articles of War, as they may think fit, for the order and discipline of all officers and soldiers, natives of the East Indies or other places within the limits of the said Company's Charter, in their respective service; and for the administration of justice by Courts Martial to be holden on such officers and soldiers; and for the constitution and manner of proceeding of such Courts Martial; and for all other purposes relating to or in any manner concerning such native officers and soldiers: in as full and ample a manner as the said Governments respectively may make any other Laws or Regulations for the government of the Natives of the several territories subject to the said territories respectively any Act of Parliament, or other matter or thing, to the contrary notwithstanding."

Customs.

Section 98 authorized the Governors in Council of the three Presidencies to impose, within the limits of their respective Presidencies, duties of customs and other taxes upon all persons resident therein in respect of all goods and property being therein; and also on all persons, British-born or foreigners, and goods resident or being within the authority of such Governments. The sanction of the Court of

Directors and of the Board of Commissioners was rendered necessary. LECTURE
IV.

In addition to those three powers of legislation conferred under the Acts of 1773, 1781, and 1813, a general power of altering the revenue, and of imposing new taxes, had been exercised within the Provinces, and is alluded to more than once in Acts of Parliament. But as there is no Act which expressly conferred it, such power has generally been considered to rest on the inherent powers of Government; whether derived in succession to the native authority from the grant of the Dewanny, or from those statutes by which the general power of government or of ordering the revenues had been given or continued to the Company.

Thus from time to time the legislative powers of the Councils were developed; and in pursuance of those powers, they enacted Laws and Regulations till 1834. Down to that date, which is the important epoch in the history of Indian legislation, there were five different bodies of statute law in force in the empire. *First*, there was the whole body of English statute law existing in 1726 so far as it was applicable, which was introduced by the Charter of George I, and which applied, at least, in the Presidency Towns. *Secondly*, all English Acts subsequent to that date which are expressly extended to any part of India. *Thirdly*, the Regulations of the Governor-General's Council, which commence with the Revised Code of 1793, containing

Power to
alter the
revenue
and impose
new taxes.

Statute
Law in
1834.

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forty-eight Regulations, all passed on the same day (which embraced the results of twelve years' antecedent legislation), and were continued down to the year 1834. They only had force in the territories within the Presidency of Bengal. *Fourthly*, the Regulations of the Madras Council, which spread over the period of thirty-two years, *viz.* from 1802 to 1834, and are in force in the Presidency of Fort St. George. *Fifthly*, the Regulations of the Bombay Code, which began with the Revised Code of Mr. Mountstuart Elphinstone in 1827, comprising the results of twenty-eight years' previous legislation, and were also continued till 1834, having force and validity in the Presidency of Fort St. David.

Necessity
for reform
in the
legislature.

In 1833 the attention of Parliament was directed to three leading vices in the frame of Indian Government. The first was in the nature of the Laws and Regulations; the second was in the ill-defined authority and power from which these various Laws and Regulations emanated; and the third was the anomalous and sometimes conflicting judicatures by which the laws were administered, or in other words the defects were in the laws themselves, in the authority for making them, and in the manner of executing them. The* Judges of the Supreme Court at Calcutta thus expressed themselves in reference to this subject:—"In this state of circumstances, no one can pronounce an opinion, or form

* See Hansard's "Parliamentary Debates" (1833), Vol. XVIII, p. 729.

a judgment, however sound, upon any disputed right of persons, respecting which doubt and confusion may not be raised by those who may choose to call it in question ; for very few of the public or persons in office at home, not even the law officers can be expected to have so comprehensive and clear a view of the Indian system, as to know readily and familiarly the bearings of each part of it on the rest. There are English Acts of Parliament specially provided for India, and others of which it is doubtful whether they apply to India wholly, or in part, or not at all. There is the English common law and constitution, of which the application is, in many respects, still more obscure and perplexed ; Mahomedan law and usage ; Hindu law, usage, and scripture ; Charters and Letters Patent of the Crown ; Regulations of the Governments, some made declaredly under Acts of Parliament, particularly authorizing them, and others which are founded, as some say, on the general power of Government entrusted to the Company by Parliament, and as others assert on their rights as successors of the old Native Government ; some Regulations require registry in the Supreme Court ; others do not ; some have effect generally throughout India ; others are peculiar to one Presidency or one town. There are commissions of the Governments, and Circular Orders from the Nizamut Adawlut and from the Dewanny Adawlut ; treaties of the Crown ; treaties of the

LECTURE IV. Indian Government; besides inferences drawn at pleasure from the application of the *droit public* and the law of nations of Europe, to a state of circumstances which will justify almost any construction of it, or qualification of its force."

The Act
of William
the Fourth.

Accordingly in that year an Act* was passed for effecting an arrangement with the East India Company and for the better government of Her Majesty's Indian territories till April 30th, 1854." It was enacted in the 43rd Section "that the said Governor-General in Council shall have power to make Laws and Regulations for repealing, amending, or altering any Laws or Regulations whatever now in force or hereafter to be in force in the said territories or any part thereof; to make Laws and Regulations for all persons, whether British or Native, foreigners or others, and for all Courts of Justice, whether established by Her Majesty's Charters or otherwise, and the jurisdiction thereof and for all places and things whatsoever within and throughout the whole and every part of the said territories and for all servants of the said Company; save and except that the said Governor-General in Council shall not have the power of making any Laws or Regulations which shall in any way repeal, vary, suspend, or affect any of the provisions of this Act, or any of the provisions of the Acts for punishing mutiny and desertion of officers and soldiers, whether in the service of Her Majesty

* 3 & 4 Wm. IV, c. 85.

or the said Company, or any provisions of any Act hereafter to be passed in anywise affecting the said Company, or the said territories, or the inhabitants thereof, or any Laws or Regulations which shall in any way affect any prerogative of the Crown, or the authority of Parliament, or the constitution or rights of the said Company, or any part of the unwritten laws* or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the said Crown over any part of the said territories."

By a later Act, 16 & 17 Vic., c. 95, s. 26, no Law or Regulation is to be rendered invalid, only because it affects any prerogative of the Crown, provided such Law or Regulation shall have received the previous sanction of the Crown signified under the royal sign manual of Her Majesty, countersigned by the President of the Board of Commissioners for the Affairs of India.

The following provisions were made in the Act of William IV :—

(1) That, in case the Court of Directors should signify to the Governor-General in Council their disallowance of any Laws or Regulations made by him, then that he should forthwith repeal all Laws and Regulations so disallowed.

Provisions
relative to
legislation.

(2) That all such Laws and Regulations should be of the same force and effect within the said

* See *postea*, page 116 *note*.

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IV.

territories as an Act of Parliament, and should be taken notice of by all Courts of Justice in the same manner as any public Act of Parliament would be taken notice of, registration or publication of such Laws or Regulations in any Court of Justice being rendered unnecessary.

(3) The Governor-General in Council was not empowered, without the previous sanction of the Court of Directors, to make any Law or Regulation authorizing any Court of Justice not established by Royal Charter to sentence to death any of His Majesty's natural born subjects born in Europe, or the children of such subjects. Nor can he abolish any of the Courts of Justice established by Royal Charter.

(4) The Court of Directors were directed to submit, for the approbation of the Board, rules regulating the procedure of the Governor-General in Council, and prescribing the modes of promulgation of any Laws or Regulations to be made by him.

An express reservation was made of the right of Parliament to continue to legislate for the said territories and for all the inhabitants thereof; to control, supersede, or prevent all proceedings and acts whatsoever of the said Governor-General in Council, and to repeal and alter at any time any Law or Regulation whatsoever made by him; and the better to enable Parliament to exercise at all times such right and power all Laws and Regulations made by the said

Governor-General in Council, were directed to be LECTURE
IV.
transmitted to England, and laid before both Houses
of Parliament in the same manner as by law pro-
vided concerning the Rules and Regulations made
by the several Governments in India.

Some subsequent Sections* relate to the establish- Indian Law
Commissioners.
ment of the Indian Law Commissioners.

No power was given in this Act to the Governor Local
legisla-
tures super-
seded.
in Council of the different Presidencies to make
laws, but they were empowered to propose to the
Governor-General in Council drafts or projects of
any Laws or Regulations which they respectively
might think expedient, together with their reasons
for proposing the same ; and the Governor-General
in Council was required to take the same and such
reasons into consideration, and to communicate his
resolutions thereon to the Government by whom
the same should have been proposed.

By Section 73, the Governor-General in Council Articles of
War.
was empowered to make Articles of War for the
government of the Native officers and soldiers in the
military service of the Company and for the adminis-
tration of justice by Courts Martial to be holden
on such officers and soldiers, and such Articles of
War from time to time to repeal, vary, and amend.

Thus there was established in India one central Conclusion.
legislative authority in place of the three Councils
which had before existed. The new Council was

* Sections 52, 53, 54, and 55.

LECTURE
IV.

armed with authority to pass Laws and Regulations for the whole of the British territories in India. It continued to exist with some changes and modifications till 1861, when it again gave way to the prevalent desire for local legislative Councils. During that time it passed a considerable number of Acts, some of general application throughout the empire, but the greater portion having a limited and partial operation. Local Legislatures had been tried and superseded by an Imperial Legislature, which in its turn was found inadequate to the political necessities of the country. An attempt was made to increase its usefulness and authority in 1853. But in 1861 a new system was introduced by which local Legislatures were re-established, not to supersede, but to work in harmony with, and to a certain extent, in subordination to the Legislative Council of the Viceroy, which retains the power of making Laws and Regulations for the whole of India, as well over those portions which are subject to, as over those which are freed from a local legislative control.

2 & 3 Vic., c. 34, was passed to confirm certain rules and orders of the Supreme Courts of Judicature at Fort William and Madras made in 1837, whereby the modes of pleading in the same Courts were in some respects altered. The Act also empowered the same Courts and the Supreme Court at Bombay to make rules and orders concerning pleadings.

6 & 7 Vic., c. 38, made further Regulations for facilitating the hearing of appeals and other matters by the Judicial Committee of the Privy Council. The greater part of the Act related to the modes of proceeding in appeals in ecclesiastical and admiralty causes.

LECTURE V.

THE LEGISLATIVE COUNCILS.—(*Continued*).

Reform of the Council in 1853—Nature of the changes made—Effect thereof—The Legislatures of 1834 and 1853 compared—Advantages of the new system—Desire for local Legislatures—Despatch of Lord Canning—His proposal to establish local Legislatures—View of the English Government—The Indian Councils' Act 1861—The Governor General's Council—Assent to laws—Legislative powers of the Council—Legislative power of the Governor-General—Local Legislatures at Madras and Bombay—Previous sanction of the Governor-General necessary to certain bills—Power to the Governor-General in Council to establish other local Legislatures—Power of Legislatures so established—Local Legislature in Bengal—Character and functions of the Councils—The Statute law.

THE Legislature established by the Act of 1834 Reform of the Council in 1853. lasted for twenty-seven years; but a considerable change was made in its character and constitution by an Act passed in 1853. The former Act was passed for a period of twenty years, and accordingly fresh legislation became necessary. Though the Council was continued upon the same footing in respect of its being the one legislative authority of India, competent to enact laws and regulations for the whole of the British territories therein, the new* Act made so many alterations that the system was entirely changed. The principal alteration, which finally led to the re-establishment of local Legislatures was the introduction of representative members from the sister Presidencies.

* 16 & 17 Vic., c. 95—An Act to provide for the government of India.

LECTURE
V.Nature of
the changes
made.

It was provided by the new Act passed in 1853* that certain Legislative Councillors should be added to the existing Council; and also that no law or regulation made by the Council should have force or be promulgated until the same had been assented to by the Governor-General whether he had or had not been present in Council at the making thereof. Further it was enacted that no law or regulation made by the Governor-General in Council should be invalid by reason only that the same affected any prerogative of the Crown provided such law or regulation had received the previous sanction of the Crown. It authorized Her Majesty to appoint a commission in England to consider the recommendations and reports of the Indian Law Commissioners.

Effect
thereof.

The effect of the new Act was to enlarge the Council, when acting in its legislative capacity, by the addition of new members, called Legislative members, of whom two were English Judges of the Calcutta Supreme Court, and the others were appointed severally by the local Governments. At the same time the fourth ordinary Councillor, who held under the former Act the corresponding office of legislative member, was made a member in the executive branch as well as in the legislative branch. Consequent upon these changes, discussion became oral instead of in writing; bills were referred to

* 16 & 17 Vic., c. 95, s. 22.

select committees instead of a single member; and legislative business was conducted in public instead of in secret. The system so introduced was considered by those who were well versed in it to be an infinite improvement upon the former system.

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Under the former Act the sole power of making laws and regulations in India was vested in the Governor General of India in Council. That body consisted of the Governor General and four ordinary members of Council; the Commander-in-Chief, if appointed an extraordinary member of Council, also formed one of the body. Of the four ordinary members it was directed that three should be appointed from persons in the Covenanted service of the East India Company, and the fourth from persons who had never been in the service. The duty of the fourth ordinary member was confined entirely to the subject of legislation. He had no power to sit and vote in the executive Council, but only when meetings were held for the purpose of making laws and regulations. It was not necessary that he should be present to form a quorum even at those meetings, although he was particularly charged with the duties of legislation. His* concurrence might be wanting to a law, but the law would nevertheless be good, even his absence at the time of enactment would not vitiate it. Parliament manifestly intended that the whole of his time

The legis-
latures of
1834 and
1853
compared.

* Consult Minute of Mr. Peacock, dated 3rd November 1859.

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and attention and knowledge and ability, should be employed in promoting the due discharge of the legislative functions of the Council. He had no pre-eminent control over the duties of that department, but he was peculiarly charged with the task of giving shape and connexion to the several laws as they passed, and also with the labor of collecting local information, and with bringing his legal skill to the assistance of the Council in order to effect a sound and rational legislation.

By the Act of 1853 the duties which under the former Act had rested principally on the fourth ordinary member of Council were performed by many. The Governor of each Presidency and the Lieutenant Governor of each Lieutenant Governorship was empowered to appoint a Legislative Councillor. The Legislative Councillors so appointed were members of the service of a certain standing, and consequently had passed a considerable time in India, were conversant with the native languages, and, when selected with reference to their peculiar qualifications for the duties of the office, were necessarily able to bring to bear upon every subject connected with legislation for India much useful knowledge and practical experience ; and in questions peculiarly affecting their respective Presidencies had the advantage of being practically acquainted with local usages and with the habits and prejudices of the people.

Such a system had many advantages over that which preceded it, even while the Indian Law Commission was in full operation ; for the Legislative Councillors had the power which the Law Commissioners had not of proposing any law which they considered necessary or beneficial, of opposing any law which they deemed unnecessary or injurious, of supporting their opinion by argument in Council and of voting on every subject which came under discussion. The Legislative Council was not diminished in other respects : for every member of the Executive Council including the fourth member who obtained the power to sit and vote at all meetings was also a member of the Legislative Council ; it was simply increased by members of practical experience. In addition to the Legislative Councillor the Chief Justice of Bengal and one of the Puisne Judges of the Supreme Court selected by the Governor General were also members ; and six members in addition to the Governor-General or the Vice-President or Chairman were necessary to form a quorum, and the presence of one of the Judges or of the fourth ordinary member was rendered essential.

Notwithstanding the improvements which it was considered on all hands that the Act of 1853 had introduced, it became necessary to re-consider the whole subject of the establishment and exercise of legislative authority. Madras and Bombay complained of the enormous preponderance of authority

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V.Advantages
of the new
system.Desire for
local legis-
latures.

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— which Bengal through her Council acquired over the sister Presidencies. The wide extent of dominion subject to the legislation of the Council rendered it impossible that all questions could be settled by the light of adequate information and experience. And the internal governance of the Council itself was such that it was rapidly assuming the character, contrary to the intentions of Parliament, of a representative and debating society assembled for the purposes of inquiry into and redress of grievances.

Despatch
of Lord
Canning.

Lord Canning in a despatch dated the 9th December 1859, pointed out what he considered to be the chief faults of the legislature as it then existed. In the first place it was invested with forms and modes of procedure closely imitating those of the House of Commons. There were 136 standing orders to regulate the proceedings of a dozen gentlemen assembled in Council; which led to delay and confusion. The assumption of the procedure of the House of Commons caused the impression, contrary to the intentions of Government, that reports and returns should be ordered by Council from the local administrations, that long debates should be held on questions of public interest, and that measures should be introduced independently of the Executive Government.

Lord Canning also expressed his opinion with reference to the constitution of the Council that

although a return to the system which existed before 1853 was impossible, it well deserved consideration whether a partial return to the still earlier system which prevailed before 1834 was not advisable.

"There is no doubt," he says, "that the introduction of a single member from each local Government has been a great advantage. But although an improvement has been thus made in the system antecedent to 1854, I do not think it has been carried far enough. I do not think that the principle of representing the local Governments having been once admitted, the Governments of Madras and Bombay can be reasonably expected to be satisfied with the share which they at present have in any legislation directly concerning their own Presidencies, and I believe that by giving them a much larger share in it, careful local measures may be facilitated and expedited, without leading to any interference with measures of a general character, or with the authority and responsibilities of the Governor General in Council."

The Governor General, after discussing and condemning an alternative suggestion to increase in the existing Council the number of members drawn from the two subordinate Presidencies, proposed that the Council should be broken up into three distinct Councils at Calcutta, Madras, and Bombay. This was the first step in the policy of decentralization which was destined to absorb so large a share

His
proposal
to establish
local legis-
latures.

LECTURE V. of public attention under the Government of Lord Mayo.

Lord Canning himself proposed not merely that the Governors of Madras and Bombay should each have a Legislative Council, but that Bengal and the North-West Provinces and the Punjab should each have its separate legislature. He also said that two things were essential in forming a body of advisers to the Governor-General in legislative matters. One that it should be capable of being assembled for business in other places than Calcutta ; and the other that it should so conduct its business as that the opinions and votes of Natives not skilled in the English language could be taken. He proposed that all measures of local administration not affecting the revenue should fall within the competency of the local Councils ; but that if the matter affected the revenue, the sanction of the Governor-General in Council should be first obtained to the introduction of a bill upon the subject. The making of laws for those provinces which have no Legislative Councils, that is for non-regulation Provinces, should be vested in the Legislative Council of the Governor-General.

The events which immediately led to the passing of the Indian Councils' Act, 1861, were the differences which arose between the Supreme Government and the Government of Madras on the Income Tax Bill ; the doubts which had been raised as to

the validity of laws introduced into non-regulation Provinces without enactment by the Legislative Council; and the address of the Legislative Council for the communication to it of certain correspondence between the Secretary of State and the Supreme Government of India.

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[Sir Charles Wood in introducing the Bill into the House of Commons recapitulated* the objections to the existing institution, which appeared to be quite as strongly felt by the Home authorities as by the Government in India. He complained that quite contrary to what was intended, the Council had become a sort of debating society or petty parliament. He quoted Sir Lawrence Peel's criticism upon its proceedings; that it "has no jurisdiction in the nature of that of a grand inquest of the nation. Its functions are purely legislative, and are limited even in that respect. It is not an Anglo-Indian House of Commons for the redress of grievances, to refuse supplies and so forth."

View of the
English
Govern-
ment.

The view which was taken by the English Government of the changes which had become necessary was thus explained: "I propose, said the Secretary of State, that when the Governor-General's Council meets for the purpose of making laws and regulations, the Governor General should summon, in addition to the ordinary Members of the Council, not less than six nor more than twelve

* See Haasard's Parliamentary Debates, Vol. 163, p. 639.

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additional members, of whom one half at least shall not hold office under the Government. These additional members may be either European, persons of European extraction, or Natives. Lord Canning strongly recommends that the Council should hold its meetings in different parts of India for the purpose of obtaining at times the assistance of those Native Chiefs and Nobles whose attendance at Calcutta would be impossible, or irksome to themselves. I do not propose that the Judges *ex-officio* shall have seats in the Legislature ; but I do not preclude the Governor General from summoning one of their members if he chooses.

“ The Council of the Governor General,” he adds, “ with these additional members, will have power to pass laws and regulations affecting the whole of India, and will have a supreme and concurrent power with the minor legislative bodies which I propose to establish in the Presidencies and other parts of India.”

And with respect to giving the power of making laws to the Governors and Councils of other Presidencies he says “ Lord Canning strongly feels that although great benefits have resulted from the introduction of members into his Council who possess a knowledge of localities, the interests of which differ widely in different parts of the country ; the change has not been sufficient in the first place to overcome the feeling which the other

Presidencies entertain against being overridden, as they call it, by the Bengal Council; or, on the other hand, to overcome the disadvantages of having a body legislating for these Presidencies without acquaintance with local wants and necessities. This must obviously be possessed to a much greater extent by those residing on the spot. And therefore I propose to restore, I may say to the Presidencies of Madras and Bombay, the power of passing laws and enactments on local subjects within their own territories; and that the Governor of the Presidency, in the same manner as the Governor-General, when his Council meets to make laws, shall summon a certain number of additional members, to be as before, either European or Native, and one half of whom at least shall not be office-holders."

Thus the "Indian Councils' Act, 1861,"* was passed The Indian Councils' Act, 1861. in order to consolidate and amend the provisions of former Acts of Parliament respecting the constitution and functions of the Council of the Governor-General of India, and to give power to the Governors in Council of the Presidencies of Fort St. George and Bombay to make laws and regulations for the government of those Presidencies, and to enable the like legislative authority to be constituted in other parts of Her Majesty's Indian dominions.

The Governor-General in Council was authorized The Governor-General's Council, to appoint the times and places of meeting of his

* 24 & 25 Vic., c. 67,

LECTURE V. Legislative Council, to make rules for the conduct of its

— *business, which rules might be subsequently amended at meetings subject to the assent of the Governor-General and subject to be disallowed by the Secretary of State in Council. The Legislative Council has no power to transact any business other than the consideration and enactment of measures introduced into the Council for the purpose of such enactment. The previous sanction of the Governor-General is necessary before any measure can be introduced into Council affecting (1) the public debt or public revenue of India, or by which any charge can be imposed on such revenues; (2) the religion or religious rites and usages of any class of Her Majesty's subjects in India; (3) the discipline or maintenance of any part of Her Majesty's military or naval forces; (4) the relations of the Government with foreign princes or states.*

Assent to laws.

No law or regulation passed by the Council at a meeting shall have validity until the Governor-General, whether or not he had been present in Council at the making thereof, shall have declared his assent to the same. The Governor-General can withhold his assent absolutely, or may reserve the same for the signification and pleasure of Her Majesty thereon. In the latter case it is necessary to the validity of a law or regulation so reserved that Her Majesty shall have signified her assent to the same to the Governor-General through the

Secretary of State for India in Council. Until such assent shall have been duly proclaimed by the Governor-General, Her Majesty, through the Secretary of State for India in Council, has power to disallow any law or regulation which has been assented to by the Governor-General ; and such disallowance shall make void and annul such law from the date on which the Governor-General shall make known by proclamation or by signification to his Council that he has received a notification of such disallowance by Her Majesty.

The legislative powers of the Council extend (1) Legislative powers of the Council. to repeal, amend or alter any laws or regulations in force in the British territories in India; (2) to make laws for all persons whether British or Native, foreigners or others, and for all Courts of Justice, and for all places and things within those territories, and for all servants of the Government of India within the dominions of princes and states in alliance with Her Majesty. But it was expressly declared that that legislative authority should not extend to repeal or in any way affect any provisions of any Act of Parliament passed at any time after the year 1860 which in anywise affects Her Majesty's Indian territories or the inhabitants thereof. Nor does it extend to pass any law or regulation which may affect the authority of Parliament, or the constitution and rights of the East India Company, or any part of the unwritten laws or

LECTURE V. constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories.*

* The Indian Councils' Act contains the same expressions as those used in the earlier Act of William the Fourth (section 43). Their meaning was the subject of discussion in the case of *Ameer Khan*, and I append the following passage from the judgment of Mr. Justice Norman in that case; See 5 Bengal Law Reports, p. 45:—

"In order to see what is meant by the words "unwritten laws or constitution whereon may depend in any degree the allegiance of any person," it is necessary to consider first what allegiance is. It is the true and faithful obedience of the subject to the sovereign. Every one born within the dominions of the king of England or in the colonies or dependencies, being under the protection therefore, according to our common law owes allegiance to the king. Every British subject is born a debtor by the fealty and allegiance which he owes his sovereign and the State, a creditor by the benefit and protection of the king, the laws, and the constitution. "Allegiance," says Sir William Blackstone (a), "is the tie which binds the subject to the king in return for that protection which the king affords to the subject." Foremost amongst the privileges assured to the subject by the protection of the sovereign is liberty and security of the person. The Crown cannot derogate from those rights. Bracton tells us that "the king is under the law, for the law makes the king." The king cannot interfere with the liberty of the subject, nor deprive him of any of his rights. How absolute soever the sovereigns of other nations may be, the king of England cannot take up or detain the meanest subject at his mere will and pleasure.

"I will proceed to consider what are the "unwritten laws and constitution" of the United Kingdom which are alluded to in the section(b). It is well known that the provisions of the Great Charter and the Petition of Right are for the most part declarations of what the existing law was, not enactments of any new law. They set forth and assert the right of the subject, according to what was assumed to be the ancient unwritten laws and constitution of the realm. * * *

(a) 3 & 4 Wm. IV, c. 85, s. 43.

(b) 2 Stephen's Blackstone, p. 418.

And in particular the Council has no authority to repeal or affect by their legislation any of the provisions which, at the time of the passing of the Indian Councils' Act, remained in force of the Acts* noted below.

Nor can it affect any Act enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India, nor any Act for punishing mutiny and desertion in Her Majesty's Army or in Her Majesty's Indian forces respectively.†

It was provided that no law or regulation made by the Governor-General in Council should be deemed invalid by reason only that it affected the prerogative of the Crown. And it was further enacted that the laws and regulations which had been previously made in respect of any non-regulation

"Now if it be true that allegiance and protection are reciprocally due from the subject and the sovereign, it is evident that the strict observance of the laws which provide for such liberty and security ensures the faithful and loving allegiance of subjects. * * * *

"On the faithful observance by the sovereign of the unwritten laws and constitution of the United Kingdom, as contained in the Great Charter and other Acts which I have mentioned, depend in no small degree the allegiance of the subjects. It would be a startling thing to find that they could be taken away by an Act of the subordinate Legislature. It would be a strange thing indeed if a great popular assembly, like the Parliament of England, had put into the power of a Legislature which has not, and in the nature of things cannot have any representative character, the power of abrogating or tampering with such fundamental laws."

* 3 and 4 William IV, cap. 85; 16 and 17 Vic, cap. 95; 17 and 18 Vic., cap. 77; 21 and 22 Vic., cap. 106, entitled "an Act for the better government of India," and 22 and 23 Vic., cap. 41, passed to amend the same.

† This is subject to the provisions contained in 3 and 4 William IV cap. 85, section 73, respecting the Indian Articles of War.

LECTURE V. province *should not be deemed* invalid, notwithstanding* any doubts which might be entertained whether they had been made in due conformity with or in pursuance of any valid legislative authority.

Legislative
power
of the
Governor-
General.

In case of emergency the Governor-General is vested with the authority of his Legislative Council to make and promulgate from time to time ordinances* for the peace and good government of the British territories in India or any part thereof. An ordinance, however so made, would only have validity for the space of six months from its promulgation, and might be earlier disallowed by Her Majesty, or controlled or superseded by a law or regulation passed by the Legislative Council.

Local
Legisla-
tures at
Madras and
Bombay.

The same Act vested in the Governors of the Presidencies of Fort St. George and Bombay power to nominate, in addition to the ordinary members of their Councils, certain persons who should be entitled to sit and vote at meetings thereof held for the purpose of making laws and regulations. The power of making such laws was vested in the Governor in Council, who was authorized to appoint times and places for its meeting, and to make rules for the conduct of its business which, with his assent, might be subsequently amended at meetings of the Council. The assent of the Governor was necessary to the validity of a law whether or not he was present at the meeting at which it was made. The

* See note at the end of this Lecture, page 125.

further assent of the Governor-General was necessary to the validity of such law; in case of such assent being withheld, the Governor-General must signify to the Governor in writing his reason for so withholding his assent. His assent moreover gives validity to the law, but subject to its disallowance by Her Majesty through the Secretary of State for India in Council.

The legislative authority, so created in each of the two subordinate Presidencies, extends to repeal and amend any laws and regulations made prior to the coming into operation of the Indian Councils' Act by any authority in India, so far as they affect such Presidency, but does not extend to legislate, so as in any way to affect the provisions of any Act of Parliament then or thereafter to be enforced in such Presidency.

The previous sanction of the Governor-General is necessary before either of such Councils can take into consideration any law or regulation for any of these purposes : (1), affecting the public debt of India, or the customs duties, or any other tax or duty then in force, and imposed by the authority of the Government of India for the general purposes of such government ; (2), regulating any of the current coin or the issue of any bills, notes, or other paper currency ; (3), regulating the conveyance by the Post Office, or messages by the Electric Telegraph within the Presidency ; (4), altering in any

Previous
sanction of
the
Governor-
General
necessary
to certain
bills.

LECTURE
V.

— way the Penal Code of India as established by Act XLV of 1860 ; (5), affecting the religion or religious *rites and usages of any class of Her Majesty's subjects* in India ; (6), affecting the discipline or maintenance of any part of Her Majesty's Military or Naval Forces ; (7), regulating patents or copy-right ; (8), affecting the relations of the Government with foreign princes or states.

It was further provided that no law or provision of any law or regulation which shall have been made by any such Governor in Council, and assented to by the Governor-General, shall be deemed invalid only by reason of its relating to any of the purposes comprised in the above list.

Power to the Governor-General in Council to establish other local Legislatures.

No local Legislatures were established in India by the Act, except those at Madras and Bombay. But the Governor-General in Council was empowered at such time as he should think fit by proclamation to extend such provisions of the Act as related to the legislative authority in the two subordinate Presidencies, to the Bengal division of the Presidency of Fort William ; and from time to time at his discretion by similar proclamation to extend the same provisions to the territories known as the North-West Provinces and the Punjab respectively. He was further empowered by proclamation to constitute from time to time new Provinces for the purposes of the Act to which the like provisions should be applicable, and to fix or alter the limits of any

Presidency or Province for the purposes of the Act. LECTURE V.

Every Lieutenant Governor in Council thus constituted is empowered to make laws for the peace and good government of his province or territory. Powers of Legislatures so established. All the provisions contained in the Act which limited the legislative power of the Governors in Council of the two subordinate Presidencies, and which related to the Governor-General's power to declare or withhold his assent to laws made in pursuance of such authority, and which related to the power of Her Majesty to disallow the same, were declared to apply to any laws or regulations which might be made by a Lieutenant-Governor in Council.

The previous assent of the Crown was rendered necessary to give validity to any of the foregoing proclamations which the Governor-General was authorized to make.

The local Legislatures have no power to control or affect by their acts the jurisdiction or procedure of the High Courts. The power of doing so rests with Parliament and the Legislative Council of the Governor-General.*

The despatch of Sir C. Wood, which accompanied the Act, directed the Governor-General at once to extend the necessary provisions of the Act to the Local Legislature in Bengal.

* See the Indian High Court's Act, 24 & 25 Vict., c. 104, s. 9, and the 37th Section of the Bengal Charter and corresponding sections in the other Charters.

LECTURE
V.

Bengal Division of the Presidency of Fort William.

Accordingly, a proclamation was issued constituting the Bengal Legislative Council on the 17th January 1862. No other local Legislature has yet been constituted.

The local Legislatures thus established differ from those which existed before the Act of William the Fourth in this important respect that in former times the Regulations of the local Legislatures were complete, and came into operation without reference to the Governor-General; while under the Indian Councils' Act,† the local Governor is bound to transmit an authenticated copy of any law or Regulation to which he has assented, to the Governor-General. No local law has any validity till the Governor-General has assented thereto, and such assent shall have been signified by him to, and published by, the Governor. If the assent is withheld, the Governor-General must signify his reason in writing for so doing.

The Governor-General therefore is at the head of all the Legislative authority exercised in British India.

Character
and func-
tion of the
Councils.

The character of these Legislative Councils is simply this, that they are committees for the purpose of making laws, committees by means of which the executive Government obtains advice and assistance in their legislation and the public derive

* Despatch dated 9th August 1861.

† See section 40.

the advantage of full publicity being ensured at every stage of the law-making process. Although the Government enacts the laws through its Council, private legislation being unknown, yet the public has a right to make itself heard and the executive is bound to defend its legislation. And when the laws are once made the executive is as much bound by them as the public, and the duty of enforcing them belongs to the Courts of Justice. Such laws are in reality the orders of Government, but they are made in a manner which ensures publicity and discussion, are enforced by the Courts and not by the executive, cannot be changed but by the same deliberate and public process as that by which they were made, and can be enforced against the executive or in favor of individuals wherever occasion requires.

The Councils are not deliberative bodies with respect to any subject, but that of the immediate legislation before them. They cannot inquire into grievances, call for information, or examine the conduct of the executive. The acts of administration cannot be impugned, nor can they be properly defended in such assemblies, except with reference to the particular measure under discussion.

A large body of statute law had grown up under the Legislatures which the Legislative Council of the Governor-General has striven in the last few years very much to reduce by the process of repeal and

The statute
law.

LECTURE
V.

consolidation. A great many Acts are of partial operation ; and according to the advice given by Mr. FitzJames Stephen* to the Legislative Council, the Indian statute book may hereafter be divided into parts corresponding to the local extent of the Acts, many of which were local in their extent ; because under the Indian Councils' Act, the local Legislatures had not power to pass them ; and before that Act, there were no local Legislatures in existence. There might be the Acts relating to Bengal, the Acts relating to Bombay, the Acts relating to Madras, the North-Western Provinces, the Presidency Towns, the Non-Regulation Provinces in separate collections of very small volumes, and then the remaining portion could comprise the general Acts relating to the country at large. The number of Acts now in force has been greatly reduced by the recent repealing and consolidating enactments ; and notwithstanding that there are four distinct Legislatures now existing in the country, the statute law of the country has within the last four years been so far reduced within reasonable limits, that the task of arranging and compressing it for the future has been considerably lightened. The rapid growth of Legislative enactments is a serious evil, and it is fortunate that steps were taken to effect their gradual codification

* Legislative Proceedings of the Governor-General's Council, 1871, p. 56.

before their excessive multiplication had increased the difficulty of the task. LECTURE V.

NOTE.—Up to the passing of the Indian Councils' Act, 1861, the Executive Government legislated by means of Circulars and Orders and Rules issued to their officers, for the Non-Regulation Provinces. The Act gave Legislative force to all the miscellaneous and ill-digested rules which had thus originated. The Non-Regulation Provinces are therefore subject to a body of law dissimilar in its origin and character from that of any other civilized country.

No Legislative force belongs to any rules and orders which have been issued by the Executive Government since that Act. The Governor-General's Council possesses the sole Legislative authority for the Non-Regulation Provinces.

With regard to the power of the Governor-General to make ordinances referred to in page 118 of the text, it was first exercised by Lord Mayo, once in 1869 for the purpose of imposing an additional half per cent. of Income Tax, and afterwards in the same year to exclude a disturbed portion of territory on the frontiers of the Punjab from the jurisdiction of the Civil Courts.*

* See Broughton's State of the Law in the Non-Regulation Provinces, p. 16.

LECTURE VI.

LATER HISTORY: THE PRESIDENCY TOWN SYSTEM.

The Presidency Town system—Duration of the Supreme Court at Calcutta—Inconveniences of the double system—Extension of criminal jurisdiction—Of the Admiralty jurisdiction—Gaol Deliveries—Jurisdiction extended over the Province of Benares—Madras and Bombay—Recorders' Courts established in 1797—Supreme Court at Madras—Supreme Court at Bombay—Discussions at Bombay—Inferior judicial authorities—Courts of Requests—Small Cause Courts—Justices of the Peace—Subject to the control of the Supreme Court—Appointment of Justices of the Peace—Their jurisdiction and powers—Presidency Town Magistrates—Coroners—Rival judicial institutions—Tendency to amalgamation—Conclusion.

The
Presidency
Town
system.

I now pass on to the history of the judicial institutions established in India previous to the introduction of the High Courts. Of those institutions several had been established by the Crown and Parliament before the acquisition of sovereign power. Others were at a later period substituted for them by the same authority. Although the later Courts so established had some jurisdiction in the Provinces, yet they were originally intended for the benefit of the Company's factories, and subsequently for the Presidency Towns; and their retention served to maintain the separation between the Presidency Towns and the Mofussil. Notwithstanding their partial jurisdiction in the Mofussil, I have ventured to collect these institutions under the head of the

Presidency Town system, including all which were established by the Crown or Parliament, and which were not vested with or did not exercise a general jurisdiction in the Provinces.

Lectures
VI.

Foremost amongst these institutions came the *Supreme Court at Calcutta*, which, as it was finally established by the Act of 1781, continued to exist for a period of upwards of eighty years and was presided over by a long series of eminent Judges. In 1861 an Act* was passed which led in the next year to the abolition of a tribunal, which began in discredit and with general reprobation, but finally obtained a lasting hold on the respect and confidence alike of Natives and Europeans. Under the Act of 1861, Royal Charters were issued establishing the existing High Courts, and from the date of the new Courts coming into existence, viz., in July 1862, the Supreme Courts ceased to exist.

Duration
of the
Supreme
Court at
Calcutta.

The history of the Court in Calcutta in the intermediate space of time was not marked by any of the dissensions and violent contests which preceded that period. But nevertheless, many inconveniences remained and were inseparable from the double system of judicial administration which prevailed. The Company's Courts had no jurisdiction, for a long time, civil or criminal, over British-born subjects. The Crown Courts could harass but could not control the Courts of the Company with which

Incon-
veniences
of the
double
system.

LECTURE
VI.

they had occasionally concurrent jurisdiction, and had but little authority over the general course of justice. There was, as Chief Justice Sir C. Grey pointed out,* an utter want of connection between the Supreme Court and the Provincial Courts and the two sorts of legal process which were employed in them. And the exercise of the powers of the one system was viewed with jealousy by those who were connected with the other; every Court in India being further liable to be perplexed by the obligation which more or less was imposed upon all, of administering three or four different sorts of law to as many classes of persons. Nevertheless the two systems were maintained; and the jurisdiction of the Supreme Court was from time to time extended by various Acts of Parliament which I shall now proceed to refer to.

Extension
of criminal
jurisdiction.

With regard to criminal jurisdiction an Act† of Parliament was passed in 1784, the effect of which was to vest the Supreme Court with jurisdiction to try all criminal offences committed by any of His Majesty's subjects in the territories of any Native Prince or State, or against their persons, or properties, or the persons, or properties of any of their subjects, or people; in the same manner as if the same had been committed within the territories directly subject to the British Government in India.

* Sir C. E. Grey's Minute, p. 1154.

† 24 Geo. III, c. 26, s. 44.

Two years later another Act of Parliament was passed, whereby all servants of the East India Company and all His Majesty's subjects resident in India were made subject to the Courts of Oyer and Terminer and Gaol Delivery for all criminal offences committed in any part of Asia, Africa, and America, beyond the Cape of Good Hope and the Straits of Magellan, within the limits of the Company's trade.*

The same Act† also declared that the Governor or President and Council of Fort St. George in their Courts of Oyer and Terminer and Gaol Delivery, and also the Mayor's Court at Madras, according to their respective judicatures, should have jurisdiction, as well civil as criminal, over all British subjects whatsoever residing in the territories of the East India Company on the Coast of Coromandel, or in any other part of the Carnatic or in the Northern Circars or within the territories of the Soubah of the Deccan, the Nabob of Arcot, or the Rajah of Tanjore.

With regard to the Admiralty Jurisdiction doubts arose how far in criminal matters it was limited by the original Charter to offences committed on the coasts of Bengal, Behar, and Orissa within the ebbing and flowing of the sea at high water mark. An Act of Parliament‡ accordingly extended the power and authority of the Court to the high seas so as to give a full

Of the
Admiralty
jurisdiction.

* 26 Geo. III, c. 57, s. 29.

† Section 30.

‡ 33 Geo. III, c. 52, s. 156.

LECTURE
VI.

jurisdiction over all offences committed thereon to be exercised according to the laws and customs of the Admiralty of England. Seven years later* the Crown was empowered to appoint all or any of the Judges of the Supreme Court at Fort William (or of either of the similar Courts at Madras and Bombay) either alone or jointly with others to be Commissioners for the trial and adjudication of prize causes and other maritime questions arising in India. And a further doubt having arisen whether the Admiralty jurisdiction of the Courts of Calcutta, Madras, and Bombay extended to any persons but those who were amenable to their ordinary jurisdiction, it was enacted† that they might take cognizance of all crimes perpetrated on the high seas by any person or persons whatsoever in as full and ample a manner as any other Court of Admiralty Jurisdiction established by His Majesty's authority in any colony or settlement whatsoever belonging to the Crown of the United Kingdom.

Gaol
Deliveries.

It was also enacted‡ in order to prevent any delay of justice or the unnecessary detention of persons charged with offences, that all His Majesty's Courts exercising criminal jurisdiction within the three Presidencies of the Company should, four times at the least in every year on such days and at such convenient intervals of time as the Judges of

* 39 & 40 Geo. III, c. 79, s. 25.

† 53 Geo. III, c. 155, s. 110.

‡ *Ibid*, Sec. 102.

the Courts respectively should appoint, hold their sessions for the purpose of taking cognizance of all matters relating to pleas of the Crown. LECTURE
VI.
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Sometime after the establishment of the Supreme Court at Calcutta the province or district of Benares was ceded to the United Company and was annexed to the Presidency of Fort William in Bengal. Parliament considering that it was expedient that that province as well as all other provinces or districts which might thereafter at any time be annexed and made subject to the said Presidency should be rendered subject to the jurisdiction of the Court* enacted that from the first of March 1801, the power and authority of the Supreme Court at Calcutta should "extend to and over the said province or district of Benares and to and over all the factories, districts and places which now are or hereafter shall be made subordinate thereto and to and over all such provinces and districts as may at any time hereafter be annexed and made subject to the said Presidency of Fort William aforesaid." Jurisdiction
over the
Province of
Benares.

The powers of the Supreme Court were thus gradually extended within the limits marked out by the Act of 1781. It had five jurisdictions, *viz.*, civil, criminal, equity, ecclesiastical, and admiralty. An appeal lay to the Privy Council in all suits when the amount in dispute was of the value of Rs. 10,000.

* 39 & 40 Geo. III, c. 79, s. 20.

LECTURE
VI.Madras and
Bombay.

In the Presidencies of Madras and Bombay the experiment of establishing a Supreme Court was *not made for some time; and apparently it was in contemplation to abstain altogether from it.*

Recorders'
Courts
established
in 1797.

The Mayors' Courts which were established at Madras and Bombay in 1753, existed till the year 1797, nearly a quarter of a century longer than the similar tribunal in Calcutta. Even in that year, when they were abolished, Parliament did not establish Supreme Courts in their stead. They were replaced by Recorders' Courts.* These consisted of the Mayor, three Aldermen, and a Recorder, being in fact the old Mayors' Courts, with the addition of a Recorder to each Court, who was to be appointed by the Crown. They had full civil, criminal, ecclesiastical, and admiralty jurisdiction. They were empowered to establish rules of practice and process and they were to be Courts of Oyer and Terminer and Gaol Delivery for Fort St. George and Bombay. They had power to try all suits which by authority of Parliament could be tried in the Mayors' Courts. Their jurisdiction extended over British subjects resident within the British territories then or thereafter to be rendered subject to the Governments of Madras and Bombay respectively or within the territories of Native Princes in alliance with those Governments.

Restrictions corresponding to those imposed by Parliament in 1781 on the jurisdiction of the

* 37 Geo. III, c. 142.

Supreme Court of Calcutta were made applicable to these Recorders' Courts. LECTURE
VI.

The new Courts did not last long. That at *Madras* existed for two years and was then abolished, a Supreme Court being established in its stead. Supreme
Court
at Madras. The powers vested in the Recorder's Court were transferred to the new Supreme Court which was also directed to have the like jurisdiction and to be subject to the same restrictions as the Supreme Court of Judicature at Fort William in Bengal. This new Charter was granted in December 1801.

The Recorder's Court at Bombay existed till 1823 when a Supreme Court of Judicature was established in its stead, and was invested with the same powers and authorities as the Supreme Court of Calcutta with a similar jurisdiction and subject to the same limitations, restrictions, and control. Supreme
Court
at Bombay.

The Charter* of the Bombay Court appears to have been slightly different from the other two Charters. The Supreme Court in that Presidency was prohibited from interfering in any matter concerning the revenue even within the town of Bombay. Natives also were exempted (and this provision appears in the Madras Charter also) from appearing therein, unless the circumstances were altogether such that they might have been compelled to appear in the same manner in a Native Court. In crimes maritime the Bombay Court's

* Morley's Digest, p. 16.

LECTURE
VI.Dissensions
at Bombay.

jurisdiction was restricted to such persons as would have been amenable to it in its ordinary jurisdiction.

The constitution of the Supreme Court at Bombay was followed shortly afterwards by disputes between the Court and the local Government similar in character (but on a smaller scale) to those which before 1781 had produced so much commotion in Bengal. The Judges claiming the powers of the Court of King's Bench issued writs of *Habeas Corpus*, one* to bring a Native boy from Poona to Bombay, and another to compel a gaoler to produce a prisoner detained under an order of one of the Company's Judges. The execution of the first was resisted by the Magistrate of Poona with the sanction of Government, because the affidavits on which it was granted were said to be false, and because neither Poona, nor the boy detained, nor the person detaining were subject to the jurisdiction of the Court. The other was resisted on the ground that the Supreme Court had no power to discharge persons imprisoned under the authority of a Native Court.

The proceedings came before the Privy Council on the petition of the sole surviving Judge who had issued the writs. The Privy Council decided that they had been improperly issued ; that the Supreme

* *In re Justices of the Supreme Courts*, Knapp's Privy Council Reports, Vol. I, p. 1 ; and see case of *Moro Ragonath*, Asiatic Journal for April 1829, and Mill's History of India, Vol. IX, p. 196.

Court at Bombay had no power or authority to issue a writ of *Habeas Corpus*, except when directed either to a person resident within those local limits wherein such Court had a general jurisdiction, or to a person out of such local limits who was personally subject to its civil and criminal jurisdiction. They also held that the Court had no power to issue a writ of *Habeas Corpus* to the gaoler or officer of a Native Court as such officer, the Court having no power to discharge persons imprisoned under the authority of a Native Court.

LECTURE
VI.
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The Supreme Courts were the chief tribunals which owed their authority exclusively to the English Parliament and Crown. There were, however, other judicial authorities, derived from the same source, which long existed in India (some of them not yet abolished), and which were originally established in days before the Company had obtained sovereign power and when they had merely to govern their own servants and those resident under their immediate protection.

Inferior
judicial
authori-
ties.

Courts of Requests, for instance, were established by the Charter of 1753 which renewed the Mayors' Courts in the three Presidency towns. They were empowered to determine suits when the debt, duty, or matter in dispute did not exceed five pagodas, *i. e.*, twenty rupees. In 1797† their jurisdiction was extended, the pecuniary limit being then fixed at

Courts of
Requests. 2

† 37 Geo. III, c. 142, s. 30.

LECTURE
VI.

eighty rupees. They were also empowered to award execution. Two years later another Act* was passed which empowered the Governments of Bengal and Madras by proclamation to increase the jurisdiction to any amount not exceeding 400 Sicca rupees and to frame new rules and orders and to reform the constitution and practice of the then existing Courts. Proclamations were accordingly issued under which Commissioners were established for the recovery of small debts, and their jurisdiction gradually extended up to 400 Sicca rupees.

Doubts arose as to the powers of the Calcutta Commissioners, and Act XII of 1848 was passed better to define their jurisdiction. Both by the Charters and the Proclamations, the Courts of Requests were made subject to the order and control of the Supreme Courts in the same manner as the inferior Courts in England are by law subject to the order and control of the Court of Queen's Bench.

Small
Cause
Courts.

These Courts of Requests were in 1850 superseded by the establishment of Small Cause Courts in the Presidency Towns. The jurisdiction of these new tribunals was subsequently extended and similar tribunals were also established in the Mofussil.

The Small Cause Courts, the Insolvent Courts, and the Vice Admiralty Courts continue to exist at the present day and will be more conveniently

described when I come to the subject of the existing judicial system.

LECTURE
VI.

The next judicial officers, who formed part of the Crown or Parliamentary system introduced into India were the Justices of the Peace. They were first established at Madras, Bombay, and Calcutta by the Charter of George I in 1726 which appointed the Governor and Councils of those places to be Justices of the Peace with power to hold Quarter Sessions.

Justices of
the Peace,

This was at a time when the only object was to introduce a purely English system for the benefit of English and other servants of the Company. The Regulating Act* made the Governor-General and Council and Judges of the Supreme Court Justices of the Peace for the settlement of Fort William and the settlements and factories subordinate thereto. The Governor-General and Council were directed to hold quarter sessions within the settlement of Fort William; such quarter sessions to be a Court of Record.

The Supreme Court Charter authorized the new Court to control the Court of Quarter Sessions and the Justices, exercising the same supervision and control over them, as the Court of Queen's Bench exercises over the inferior Courts and Magistrates. It also empowered the Court to issue to them writs of *mandamus*, *certiorari*, *procedendo*, and *error*. The

Subject to
the control
of the
Supreme
Court.

LECTURE
VI.

Judges of the Court were also appointed Justices of the Peace in the Lower Provinces of Bengal, with such jurisdiction and authority as Justices of the Queen's Bench have within England by the common law thereof.

Appoint-
ment of
Justices of
the Peace.

Originally the only Justices of the Peace in India were the Governors and Councils of the three Presidencies, and the Judges of the Calcutta Supreme Court. Subsequently when Supreme Courts were established at Madras and Bombay, the Judges of those Courts were also made Justices of the Peace for their respective Presidencies ; and the Courts were vested with the same authority as the Calcutta Supreme Court over the proceedings of the Justices.

In 1793* an Act of Parliament empowered the Governor-General in Council to appoint Justices of the Peace from the Covenanted servants of the Company, or other British inhabitants, to act within and for the three Presidencies and the places thereto subordinate respectively by commissions to be issued out of the Calcutta Supreme Court, on the warrant of the Governor-General in Council.

Justices so appointed were not to sit in any Court of Oyer and Terminer and Gaol Delivery, unless called upon by the Judges of the Supreme Court, and specially authorized by order in Council. All proceedings before Justices† of the Peace were

* 33 Geo. III, c. 52, s. 151.

† See 153rd section of the same Act.

removable by *certiorari* into the Court of Oyer and Terminer. LECTURE
VI.

In 1807* the Governors and Councils of Madras and Bombay were authorized to act as Justices of the Peace for those towns respectively, and to hold quarter sessions. They were also empowered to issue commissions under the seals of the Courts appointing British subjects to be Justices of the Peace in the provinces.

In 1832† the Governments of the three Presidencies were respectively empowered to appoint in the name of the King's Majesty, any persons resident within the territories of the Company, and not being subjects of any foreign State, to act within and for the three Presidency towns respectively as Justices of the Peace.

The Governments of the three‡ Presidencies, under the authority of Parliament, enacted from time to time various regulations authorizing and empowering Justices of the Peace to take cognizance of and punish certain offences. Their jurisdiction and powers.

Several Acts§ were passed by the Imperial Legislative Council to regulate the jurisdiction and powers of Justices of the Peace. Their jurisdiction extended

* 47 Geo. III, c. 68, ss. 2, 4.

† 2 & 3 Wm. IV, c. 117.

‡ See Morley's Administration of Justice, p. 36.

§ See Act IV of 1835, Act I of 1837, Act XXXII of 1838, Act IV of 1843, Act VI of 1845, Acts VIII & IX of 1849, and Act VII of 1853.

LECTURE
VI.

over the whole Presidency for which they were appointed. The classes subject to them* were—

(1) All persons whatever, whether British or Native subjects, in respect of offences committed within the limits of the ordinary jurisdiction of the Supreme Courts.

(2) All British subjects, resident in any part of the Presidency, except that, as regards crimes and offences triable by jury, and committed by British officers or soldiers at places more than 120 miles from the seat of Government, they were not called upon to interfere, such crimes being cognizable by a Court Martial.

(3) All persons who had committed crimes or offences at sea.

Lastly, all persons whatever resident without the jurisdiction of the Supreme Courts and the Court of the Recorder of Prince of Wales' Island were subject to the jurisdiction of Magistrates and Joint Magistrates acting as Justices of the Peace in certain cases. The law regulating the appointment and powers of Justices of the Peace was subsequently laid down by Act II of 1869 (to consolidate and amend the law relating to the appointment of Justices of the Peace).

Presidency
Town
Magistrates.

Magistrates of Police for the Presidency Towns were first appointed under Act XIII of 1856. The Act required that they should be previously made

* See Morley's Administration of Justice in India, page 40.

Justices of the Peace ; and gave to each of them all the powers and jurisdiction which are by law vested in two Justices of the Peace.

Both by the Code of Criminal Procedure passed in 1861* and previously thereto, European British subjects could only be committed or held to bail for trial by a Justice of the Peace. A Magistrate (not being a Justice of the Peace) could only hear the complaint, issue a warrant of arrest, and hold him to bail with a view to the complaint being investigated by a Justice of the Peace.

The functions of a Justice of the Peace were three-fold : first, the trial and punishment under certain Acts and Statutes† of offences by summary conviction, and without a jury ; secondly, the investigation of charges in view to the committal or discharge of the accused person ; and, thirdly, the prevention of crime and breaches of the peace.

By the 157th section of the Statute noted below,‡ ^{Coroners.} it was recited that it was expedient that Coroners should be appointed for the settlements in India for taking inquests upon view of the bodies of persons coming or supposed to have come to an untimely end. It was accordingly enacted that the Governor-General in Council at Fort William and the Governor in

* Act XXV of 1861, see p. 39.

† Sec 53 Geo. III, c. 155 ; Act VII of 1853 ; and Criminal Procedure Code, 1861, sections 163 and 165.

‡ 33 Geo. III, c. 52.

LECTURE
VI.

Council at Fort St. George ^{and} in Bombay within their several Presidencies should have full power by orders in Council from time to time to appoint certain British subjects to be Coroners, and by like orders to supersede or remove them as occasion might require. Coroners so appointed were directed to take the like oaths and to exercise the like powers and jurisdiction within the limits of the settlements for which they were respectively appointed as were provided for Coroners elected for any county or place in England.

All the Judges of the Supreme Court were made Coroners as well as Justices of the Peace for their respective Presidencies.

The law relating to Coroners and their juries was laid down in certain recent* Acts ; but that which at present regulates their proceedings and the jurisdiction of Coroners is laid down in a recent Act of the Imperial Legislative Council, viz. Act IV of 1871.

Rival
judicial
institutions.

Of the period of time which I have just had under consideration (1781—1861), half a century was marked by as wide a separation, as was compatible with social order, between the judicial authorities which controlled British-born subjects and ruled in the Presidency Towns and those which regulated the provinces and generally speaking the affairs of Natives. That separation originated in the peculiar

* Acts XLV of 1850, IV of 1848, and XXVI of 1848.

circumstances under which a Company became as it were the rivals of the Crown, and when once established, appealed to the prejudices of conquest and resisted all attempts to alter or abolish it. The Crown from the earliest introduction of its subjects into the country provided for the administration of justice amongst them by a system analogous to that which existed at home. The design of the Regulating Act was eventually to extend that system over the conquered country. It signally failed, and was from the first impossible. The Company, in the exercise of the sovereign power which they derived from the Mogul Emperor through the grant of the dewanny, established a system of Courts suited to the wants of the country, but having no power over those who owed no allegiance to the Mogul. A compromise was made in 1781 by which the power of the Crown Courts was restricted; and the tribunals of the Company were recognized by Parliament. Thenceforward time and policy favored amalgamation, but numerous circumstances and strong party feeling tended to prevent or delay it.

I shall in the next two lectures sketch the history of the provincial Civil and Criminal Courts which were established by the Company. This however will be a convenient place to note the various encroachments which were made upon the exclusive jurisdiction over Europeans which belonged to the

LECTURE
VI.

Crown Courts, and the attempts which were made to transfer some portion of it to the rival institutions of the Company.

Tendency
to
amalgama-
tion.

In 1813 the first step was taken to vest the Company's Courts with Civil jurisdiction over British subjects and destroy that complete independence of the local Courts which Europeans had previously possessed. It was enacted* in that year by Parliament that British subjects residing, trading, or holding immoveable property in the provinces, should be amenable to the Civil Courts in suits brought against them by Natives. Even then their distinctive privilege of exemption was not entirely lost sight of and the right was given to them of appeal to the Supreme Court in cases where Natives had the right of appeal to the Sudder Court.

In 1836† after the establishment of the Legislature of 1834, an Act was passed which repealed the provision just quoted of the statute of George III invidiously giving a right of appeal to the Supreme Court. It enacted that no person by reason of birth or descent should be exempt from the jurisdiction of the Company's Courts.

No further step was taken towards a uniform administration of civil justice till the union of the Sudder and Supreme Courts was effected by Act of Parliament.

* 53 George III, c. 155, s. 107.

† Act XI of 1836.

The general exemption of Europeans from the criminal jurisdiction of the provincial Courts has remained till the present day. The Criminal Procedure Code and the Indian High Courts' Act, both passed in 1861, recognize and preserve that exemption. And the powers of the old Supreme Court, derived from its Charter and from analogy to the Court of Queen's Bench, are still retained by the High Court in its original jurisdiction, although neither necessity nor convenience requires it.

Circumstances however led to that exemption being slowly and reluctantly challenged. By the Statute of George III to which* I have frequently referred, the Magistrates in the Provinces were authorized to act as Justices of the Peace and to have jurisdiction over British subjects out of the Presidency Town in certain criminal cases and also in cases of small debts due by them to Natives. After the Legislature of 1834 was established the jurisdiction of such Magistrates was gradually increased.† The Mahomedan Code of Criminal law was gradually disused, and for the last ten years the Penal Code has applied alike to Europeans and Natives.

At the present day Englishmen and Natives are Conclusion. subject in civil matters to the same Courts and to the same procedure; in criminal matters, to the

* 53 Geo. III, c. 155.

† See Acts XXXII of 1838 and IX of 1849, Act IV of 1843, Act VII of 1853.

LECTURE
VI.

same substantive law, and the same appellate authority, but in a great degree to different Courts for purposes of commitment and trial, and to a different procedure. The recent Criminal Procedure Code which is shortly to come into operation, has endeavoured to lessen the existing distinctions, and in the course of a few years we may possess not merely a uniform Criminal law but as nearly as possible a uniform system of its administration.

LECTURE VII.

LATER HISTORY: THE PROVINCIAL CIVIL COURTS.

Foundation of Civil Courts—Establishment of Supreme Court—Rival establishments of the Company—Changes in the scheme of 1772—Native authority restored—Effect of the changes—Separation in 1780 of Civil and Revenue Jurisdiction—Struggles between Civil and Revenue Courts—Sudder Dewanny Adawlut—Finally established by Act of Parliament—Re-union in 1787 of Civil and Revenue Jurisdiction by Lord Cornwallis—Changes in the Courts to effect that object—Second separation in 1793 of Civil and Revenue Jurisdiction—Reasons for that separation—Duties of Collectors—Courts of Dewanny Adawlut—Sudder Dewanny Adawlut—Provincial Courts of Appeal—Lower grades of Judges—Changes in the Civil Courts in 1831—Gradual re-union 1793—1831 of Civil and Revenue Jurisdiction—First step towards re-union—Second step—Third step—Civil and Revenue Jurisdiction united for the third time (1831)—Further extension of the Collector's jurisdiction—Suits cognizable by the Collectors under Act X of 1859—Control over the Collectors—Opposition to the passing of Act X of 1859—Consequences of the Act—Third separation of Civil and Revenue Jurisdiction—Act VIII of 1869 (B. C.)—Further history of the Civil Courts—Necessity for their re-establishment—Madras Courts—Inferior tribunals—Bombay* Courts—Revenue jurisdiction in both Presidencies.

THE earliest proceeding of any importance, with reference to the establishment of Provincial Courts for the administration of civil justice, was the report of Warren Hastings and the scheme which was prepared in 1772.* A leading feature, it will be remembered, of that scheme was the union of fiscal and judicial authority in the same officers.

Foundation
of Civil
Courts.

* See *ante*, page 37.

LECTURE
VII.Establish-
ment of
Supreme
Court.

Then followed the policy already described which led to the establishment of the Supreme Court, and the disastrous results of the first few years of its administration. The plan, if ever it had been formed, as there seems reason to suspect, of drawing into the hands of the new Court the superintendence of the whole administration of justice, had obviously failed. So also had failed Mr. Sullivan's scheme for establishing a somewhat similar Court, whose members were to be appointed by the Company ; and which it was intended should bring the whole of the Native Courts into subordination to it.* A Court therefore was established, whose jurisdiction extended over all the vast territories included in the Presidency of Fort William ; but which was isolated from the general Courts of the country over which it failed to acquire any influence or authority. It had a personal jurisdiction thinly scattered over a dense population and a wide extent of country. It enforced that jurisdiction, issued its writs, seized and sold lands and property in the midst of people who lived under a different law and procedure from those observed by the Court, and were subordinate to other tribunals.

Rival
establish-
ments of
the
Company.

Contemporaneously with the establishment of the Presidency Town system which I have described in the last lecture, and which emanated mostly from

* Fifth Appendix to Third Report of Select Committee, 1831 ; Sir C. Grey's Minute, pp. 1142, 1145.

the Crown and Parliament, the Company had striven to establish a Mofussil system by which the administration of justice throughout the country was secured. I shall now proceed to sketch the history of the civil and criminal institutions which were so established, and by aid of which, with occasional interference from the powers which belonged to the rival system, the Company endeavored to rule the three Presidencies which they had acquired.

The Regulating Act led to numerous alterations in the scheme of Warren Hastings ; for the Governor-General was out-voted by a majority of his Council who had recently arrived from England. The changes which they made in the Civil Courts were as follows:—In 1775 the superintendence of the collection of the revenue was vested in six provincial Councils, appointed for the respective divisions of Calcutta, Burdwan, Dacca, Moorshedabad, Dinagepore, and Patna ; and the administration of civil justice was transferred from the European Collectors who were recalled, to native Amils who were appointed instead. From them an appeal lay in every case to the new provincial Councils, and thence under certain restrictions to the Governor and Council as the *Sudder Adawlat*.

Changes in
the scheme
of 1772.

In the same year the Directors urged the restoration of Mahomed Reza Khan to the high office which he had held at Moorshedabad, and from which he had been dismissed by Mr. Hastings.*

Native
authority
restored.

* Mill's History of England, Vol. III, p. 455.

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The majority of the Council were in favor of again making him in name and title the Naib Subah, *i. e.* in effect recognizing the existence of the Nabob's government, deeming that step politic for managing discussions with foreign factories. Mr. Hastings unsuccessfully opposed it, saying "that the Nabob is a mere pageant, without the shadow of authority, and even his most consequential agents receive their express nomination from the servants of the Company." The Judges of the Supreme Court had held the same thing, when a servant of the Nabob's claimed exemption from their jurisdiction as an ambassador. "I do not," said Mr. Hastings, "remember any instance, and I hope none will be found of our having been so disingenuous as to disclaim our own power, or to affirm that the Nabob is the real sovereign of those provinces."

Mahomed Reza Khan* was removed again in 1778 after Mr. Hastings had, through the death of one of his colleagues, become, with the aid of his own casting-vote, supreme in the government.

Effect of
the
changes.

The effect of the alterations made in 1775, taken together with the transference of the Nizamut Adawlut from Calcutta to Moorshedabad, was to revive to some extent the Native government for the purposes of administering civil and criminal justice, probably with a view to elude the interference of the Supreme

* Mill's History of India, Vol IV, p. 20.

Court; and to effect a considerable separation between that department and the business of revenue collection and management.

LECTURE
VII.

In 1780 Regulations were passed in pursuance of the legislative authority granted by the Regulating Act, and by those Regulations the separation just referred to between the judicial and revenue authority was completed. The jurisdiction of the six provincial Councils was confined exclusively to revenue matters;* and it was resolved that, for the more effectual and regular administration of civil justice, district Courts of Dewanny Adawlut should be established within the jurisdictions of the six provincial Councils. These Courts were to be independent of the Councils, and to exercise jurisdiction over all claims of inheritance to zemindaries, talookdaries, and other real property, or mercantile disputes, and all matters of personal property; all cases regarding revenue or rent being reserved for the exclusive cognizance of the provincial Councils or of the Collectors† who superseded them.

Separation
in 1780
of civil and
revenue
jurisdiction.

Eighteen of these Dewanny Adawluts were established. Regulations for their guidance were drawn up by Sir Elijah Impey, and incorporated in a revised code. The ultimate appeal lay to the Sudder Dewanny Adawlut. And shortly after this distinct separation of civil justice from revenue collection,

* Reg. I, 1780, s. 3.

† See Harington's Analysis, Vol. I, p. 31.

LECTURE
VII.

the Supreme Court was deprived of the right to interfere in matters concerning the revenue.

Thus, in seven years from the date of Warren Hastings' scheme, which united in the same hands fiscal and judicial powers, a considerable alteration was made in the constitution of the tribunals of civil justice. The period had been conspicuous for the conflict which had been carried on between the Supreme Court and the Governor-General's Council, which resulted in the Act of Parliament of 1781. Experience seemed to suggest that it was advisable to divide the business of the provincial tribunals into two parts; that which peculiarly concerned the revenue, and that which peculiarly concerned individuals. The former continued to be preserved to the provincial Councils, that is to the Collectors who eventually superseded them : but they were exonerated from the burden of adjudicating upon private disputes, which was transferred to separate Courts styled the Dewanny Adawluts.

Struggles
between
civil and
revenue
Courts.

Then there ensued a struggle between the Civil and Revenue Courts, insignificant, no doubt, as compared with the civil war, which raged between the Supreme Court and the Supreme Council, but sufficient to engage the serious attention of Government. The rival claims of the Revenue and Civil Courts, to exercise jurisdiction, were destined to a long antagonism and to varying success. At the present day they are not settled, and constantly occupy the

time of the Legislatures and of Government. It is interesting to observe that, within a few months of the separation of their functions, the Governor-General penned a minute,* which said:—"The institution of the new Courts of Dewanny Adawlut has already given occasion to very troublesome and alarming competition between them and the provincial Councils." The history of the Civil Courts of this country involves a narrative of these struggles which ensued between the revenue authorities and the judicial officers to gain exclusive jurisdiction.

LECTURE
VII.

From the first, however, the business of the Sudder Dewanny Adawlut was described to be not only to receive appeals from these Courts, but to superintend their conduct, revise their proceedings, remedy their defects, and generally to form such new Regulations and checks as experience should prove to be necessary to the purpose of their institution. Next year the Chief Justice of the Supreme Court was appointed Judge of the Sudder Dewanny Adawlut, and was vested with all its powers. The Governor-General and Council, who previously formed that Adawlut, ceased to belong to it, but it was expressly stipulated that the Chief Justice should enjoy the office and salary at their pleasure. The Chief Justice, in fulfilment of the duties which devolved upon him by virtue of his new office, prepared a series of Regulations for the guidance of the Civil

Sudder
Dewanny
Adawlut.

* Mill's History of India, Vol. IV, p. 245

LECTURE
VII.

Courts, which were afterwards incorporated in a revised code passed in 1781.

Finally
established
by Act of
Parlia-
ment.

In the same year, that is in 1781, the Sudder Dewanny Adawlut was constituted by Act of Parliament* a Court of Record. Although it was not established by Royal Charter, it was nevertheless distinguished from the ordinary Courts of the Company, and traced its final establishment to the recognition and sanction of the Imperial Parliament. In the next year the Court of Directors sent out orders to the Governor-General in Council to resume the superintendence of that Court.

Re-union in
1787 of civil
and reve-
nue juris-
diction by
Lord Corn-
wallis.

Lord Cornwallis came to India as Governor-General in 1786. Previous to his arrival, an Act of Parliament† had established a Board of Commissioners for the Affairs of India, and had directed enquiries to be made as to the grievances of the Natives. Lord Cornwallis brought with him instructions from the Court of Directors, dictated with a view to carry out the object of Parliament, which was in the words of the Act:—"to establish permanent rules for the settlement and collection of the revenue, and for the administration of justice founded on the ancient laws and local usages of the country."

He accordingly directed the re-union of the functions of civil and criminal justice with those of the collection and management of the revenue. He

* 21 Geo. III, c. 70, s. 71.

† 24 Geo. III, c. 25.

placed the Dewanny Adawluts under the superintendence of the Collectors ; he resolved in Council to resume the superintendence of the administration of criminal justice throughout the provinces ; and after a few years removed to Calcutta the Nizamut Adawlut which had been, during the time of Warren Hastings, transferred to Moorshedabad. Although the functions of civil justice and of the collection of the revenue were re-united in the person of the Collectors, the Courts over which they presided were kept distinct. Lord Cornwallis's policy, apparently, was to revive the institutions which had been framed in pursuance of the scheme of 1772 and to carry out the intentions of Warren Hastings before the changes made by the Council led to the adoption of a different system.

LECTURE
VII.

It was in* the year 1787 that it was resolved, in obedience to the Court of Directors, that the office of Judge of the several mofussil Courts (except those which were established in the cities of Patna, Moorshedabad, and Dacca) should be held by the person who had charge of the revenue ; and in the same year a revised code of judicial Regulations adapted to this change of system was published. All revenue cases were by this code transferred to the Collector, from whom an appeal lay to the Board of Revenue, and ultimately to the Governor-General in Council. The object of thus reverting

Changes in
the Courts
to effect
that object.

* Harington's Analysis, Vol I, p. 32.

LECTURE
VII.

to the system which had been discontinued in 1780 was to accustom the Natives to look to one master. It was considered impossible, after the experience of seven years, to draw a line between the revenue and judicial departments in such a manner as to prevent their clashing. The then existing Regulations had endeavored to do so, but constant confusion had been the result.

Second
separation
in 1793
of civil and
revenue
jurisdiction.

But in* a minute of Lord Cornwallis, published in 1793, he said:—"There is no class of men which Government should watch with greater jealousy, and on whom the Regulations should have a stricter control than the officers who are entrusted with the collection of the public revenue. It is necessary to arm them with power to enforce their demands, * * * ; but to prevent the abuse of this power, there should be Courts of Justice ready to punish oppression and exaction." The experience of six years induced Lord Cornwallis to return to the system of separation of the fiscal and judicial systems which he found in existence on his arrival.

Accordingly in the same year he established a complete system of judicature throughout the Presidency of Bengal, and formed the existing Regulations into a regular code. The chief feature of the new system was the abolition of the revenue Courts and the transference of all causes hitherto tried by revenue officers to the Civil Courts; thus entirely separating

* Harington's Analysis, Vol. I, p. 42.

the collection of revenue from the administration of justice which were thenceforth confided to separate officers. "All questions," said the preamble to the Regulation* which carried out this policy, "between Government and the landholders respecting the assessment and collection of the public revenue and disputed claims between the latter and their ryots, or other persons concerned in the collection of their rents, have hitherto been cognizable in the Courts of Maal Adawlut, or Revenue Courts. The Collectors of the revenue preside in these Courts as Judges, and an appeal lies from their decision to the Board of Revenue, and from the decrees of that Board to the Governor-General in Council in the department of revenue.

LECTURE
VII.

Reasons for
that separation.

"The proprietors can never consider the privileges which have been conferred upon them as secure, whilst the revenue officers are vested with these judicial powers. Exclusive of the objections arising to these Courts from their irregular, summary and often *ex parte* proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functions whenever they interfere with their financial duties; it is obvious that, if the Regulations for assessing and collecting the public revenue are infringed, the revenue officers themselves must be the aggressors, and that individuals who have been wronged by them in one capacity

* Reg. II of 1793.

LECTURE
VII.

can never hope to obtain redress from them in another. Their financial occupations equally disqualify them for administering the laws between the proprietors of land and their tenants.

“Other security therefore must be given to landed property and to the rights attached to it, before the desired improvements in agriculture can be expected to be effected. Government must divest itself of the power of infringing in its executive capacity, the rights and privileges which, as exercising the legislative authority, it has conferred on the landholders. The revenue* officers must be deprived of their judicial powers. All financial claims of the public, when disputed under the Regulations, must be subjected to the cognizance of Courts of Judicature, superintended by Judges who, from their official situations and the nature of their trusts, shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land, and also between the latter and their tenants. The Collectors of the revenue must not only be divested of the power of deciding upon their own acts, but rendered amenable for them to the Courts of Judicature, and must collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they are authorized to demand on behalf of the public and for every deviation from the Regulations prescribed for the collection of it.”

It must be admitted that this preamble lays down a sound and reasonable policy, founded upon strict justice, necessary for the due preservation and security of what are called landed interests. But although that policy was immediately carried out by Lord Cornwallis, constant attempts were successfully made in the interests of the Executive to depart from it in later times. At the present day there is an Act in force through a large portion of the Presidency of Bengal, *viz.*, Act X of 1859, which directly violates the principles and policy laid down in the preamble to that famous Regulation.

LECTURE
VII.

The Collectors were thenceforth entrusted with the collection of the revenue payable to Government as executive officers subordinate to the Board of Revenue. The nature of their duties was described in Section 8, Regulation II of 1793.†

Duties of
collectors.

* Vol. 1, Bengal Reg., p. 11.

† Their duties were as follows:—

First.—To collect the amount of the fixed revenue assessed upon the lands of the zemindars, independent talookdars or other actual proprietors of land, with, or on behalf of whom a settlement has been or may be concluded.

Second.—To collect the stipulated annual revenue from the farmers of estates let in farm.

Third.—To levy the rents and revenues from estates held khas.

Fourth.—To make the future settlement of khas, or farmed estates agreeably to the Regulations and Instructions which they may receive for that purpose.

Fifth.—To prosecute for the recovery of the dues of Government from lands of whatever description held exempt from the payment of revenue under illegal or invalid tenures.

LECTURE
VII.Courts of
Dewanny
Adawlut.

Having thus confined the Collectors to their exclusively executive functions, the next step was to reorganize the Courts of Justice and render them efficient and independent. Accordingly by the next Regulation,* Government, in the language of its preamble, divested itself “of the power of interfering in the administration of the laws and Regulations in the first instance, reserving only as a Court of Appeal or Review the decision of certain

Sixth.—To pay the pensions and allowances included in the public revenue and the pensions and compensations granted in consequence of the abolition of the sayers.

Seventh.—To execute the instructions which may be issued to them by the Court of Wards regarding disqualified landholders and their estates.

Eighth.—To superintend the division of landed property paying revenue to Government, which may be ordered to be divided into two or more distinct estates.

Ninth.—To apportion the public revenue on lands ordered to be disposed of at public sale for the discharge of arrears of revenue.

Tenth.—To collect the tax on spirituous liquors and intoxicating drugs or articles.

Eleventh.—To procure lands of the native invalid soldiers who may accept of a provision in land (a).

Twelfth.—To collect the tax for defraying the expense of the police.

Thirteenth.—To perform the above and all other duties according to the rules that have been or may be prescribed to them, by any Regulation published in the manner directed in Regulation XII, 1793.

Fourteenth.—To transmit such annual, monthly, or other accounts as they now furnish, or may be hereafter required to send by the Board of Revenue, or any officer under that Board empowered to require such accounts.

Fifteenth.—To conform to all special orders that have been or may be issued to them by the Board of Revenue, or by public officers empowered to issue such orders.

* Reg. III of 1793.

(a) See Reg. II, 1811.

cases in the last resort;" and lodged its judicial authority in Courts of Justice. Courts of Dewanny Adawlut for the trial of civil suits in the first instance were by this Regulation established in twenty-three zillahs and three cities. It defined their jurisdiction, and directed the Judges of those Courts to act when no specific rule existed according to justice, equity, and good conscience.

LECTURE
VII.

The Sudder Dewanny Adawlut was established at the Presidency and consisted of the Governor-General* and Member of the Supreme Council. It received appeals from the Provincial Courts and Councils and from the Board of Revenue. In 1801 it was made to consist of three Judges to be selected from the covenanted servants of the Company;† and in 1811 of a Chief Judge and as many Puisne Judges as the Governor-General in Council should think necessary.

Sudder
Dewanny
Adawlut.

In 1831 a Sudder‡ Dewanny Adawlut was constituted for the North-Western Provinces with similar powers.

Four provincial Courts were established within the provinces of Bengal, Behar, and Orissa for the purpose of hearing appeals from the several zillah and city Courts; the Sudder Dewanny Adawlut being vested with appellate jurisdiction and general power of supervision over the inferior Courts in all

Provincial
Courts of
Appeal.

* Reg. VI of 1793.

† Reg. II of 1801.

‡ Reg. VI of 1831.

LECTURE
VII.

suits above Rs. 1,000. By later Regulations two more provincial Courts were established ; one for the province of Benares, and one for the Ceded Provinces.

Lower
grades of
Judges.

Below the city and zillah Courts were two classes of inferior Judges. First in order, the registers of those Courts who, when authorized by the Judges, were empowered to try and decide causes for amounts not exceeding Rs. 200; their decrees not being valid until revised and countersigned by the Judge. The next and lower grade of Judges were the native Commissioners who were empowered by Regulation XL of 1793 to hear and decide civil suits for sums of money or personal property of a value not exceeding 50 sicca rupees. Of these officers, the head Commissioners were called Sudder Ameens, and the rest were called Moonsiffs.

This was the general outline of the new system which was established for the administration of civil justice. The year 1793 marks the era of independence in that administration. The Government endeavoured to separate between their judicial and executive functions and to render the officers who performed the latter functions amenable to the authority of those who exercised the former duties. The Courts so established lasted for a considerable space of time, nearly eighty years, but by the process of occasional extension and repeal the statutory provisions which created them were enveloped in some obscurity.

Some alterations in detail were made during subsequent years. Regulation XXIII of 1814 consolidated the several rules which had been passed regarding the office of the native Commissioners; modified and extended their powers in the trial and decision of civil suits; authorized the Judges of the zillah and city Courts to employ them in the execution of certain additional duties; and transferred to the provincial Courts the control over their appointment and removal which had been formerly exercised by the Sudder Dewanny Adawlut.

LECTURE
VII.Changes in
the Civil
Courts in
1831.

At length in 1831 Regulation V of that year made some important alterations. The object was recited in the preamble to be the gradual introduction of respectable Natives into the more important trusts connected with the administration of the country. Moonsiffs were invested with power to try and determine suits for money and other personal property of the value of Rs. 300, and suits with regard to land of the value of Rs. 300, except such land as was exempt from the payment of revenue. The Judges were empowered to refer to the Sudder Ameens any suits the value of which did not exceed Rs. 1,000. Principal Sudder Ameens were also authorised to be appointed, to whom suits might be referred not exceeding Rs. 5,000. Registers' Courts were abolished; provincial Courts of Appeal were gradually superseded, and in two years finally abolished, and original jurisdiction was given

45

LECTURE
VII.

to the Judges in all suits exceeding in value Rs. 5,000, with an appeal direct to the Sudder Dewanny Adawlut.

Gradual
re-union
1793—1831
of civil and
revenue
jurisdiction.

During this time, that is in the period which intervened between 1793 and 1831, the relations of the Collectors to the Civil Courts underwent considerable alterations.

First step
towards
re-union.

The system of 1793, which, to all appearance, had finally severed the work of administering justice from that of collecting revenue had provided,* in order to ensure expedition, that the Judges of the zillah and city Courts might refer petty suits to their registers, or as they came to be called in later times Sudder Ameen or Principal Sudder Ameen as the case might be. Advantage was taken of this circumstance in the very next year to re-invest the revenue officers with some of the power which they had lost. It was the duty of the Judges to revise the orders of the registers, and to countersign them before they were considered to be valid. The work of revision was found to be as long as that of trying in the first instance. And so it was enacted by Regulation VIII of 1794 that the Courts might refer to the Collectors all cases which, before the new system, had been cognizable by them. The Collectors were thereupon bound to send in their report which the Judge might confirm or set aside, or he might make any order thereon that he might think

* See Reg. XIII of 1793.

fit. This was the commencement of a re-transfer to the Collectors of judicial functions ; increased authority being required, as it was urged, to enable them to obtain payment of the Government revenue.

In the next year, a summary procedure was provided for the determination of claims to arrears of rent. This was superseded by Regulation VII of 1799, which for a long time formed the basis of summary suit law. It was recited in that Regulation that the powers of the landholders for enforcing payment of rents had been in some cases found insufficient, and that considerable delay had occurred in payment of Government revenue. It referred to the summary process of recovery given by Regulation XXXV of 1793 and enacted several rules in lieu thereof. It enforced the strictest observance of the rule laid down in Regulation VII of 1793 that the Civil Courts were to give priority to rent and revenue cases. They were still authorized to refer cases for report to the Collectors, and afterwards to adjudicate upon them. The object of the Regulation was to enable landed proprietors to realize their rents speedily, with a view to punctual payment of Government revenue.

Again, in 1812,* a summary remedy was given to the ryot against his landlord in all cases in which he was aggrieved by distress for rent. The cognizance of such cases was also practically vested in

* See Reg. V of 1812.

LECTURE
VII.
the Collector, to whom they were ordered to be referred.

Third step. And in 1824, about thirty years after Lord Cornwallis' policy had been carried into effect, an important Regulation* was passed, which recited that the provisions contained in the Regulations then in force empowering the Judges of the zillah and city Courts to refer accounts and summary suits to the Collectors for report, had been found insufficient to expedite trials. It was considered by the Legislature to be indispensable to the attainment of that object that the revenue officers should be vested with authority to hear, investigate, and determine by a summary process, and subject to a regular suit in the Civil Court, all rent suits which might be referred to them by the Judges. Rules were enacted in this Regulation for their guidance, and the same powers were given to them, as were vested in the Civil Courts, for compelling the attendance and the examination of witnesses, and generally for all process, except execution of their decrees which was confided to the Civil Courts.

Civil and
revenue
jurisdiction
united for
the third
time(1831).

This was followed in 1831 by another Regulation, which deprived the Judges of all jurisdiction over summary suits relating to rent, and transferred them to the exclusive cognizance of the Collectors, whose decisions were to be final, subject to a regular suit, which was to be brought in the Civil Court. The

* Reg. XIV of 1824.

Commissioner could revise the decision of the Collectors, solely on the ground of the case not being of a nature cognizable as a summary suit.

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VII.

Thus in 1831 rent and revenue cases were again transferred to the Collectors, in order to facilitate the collection of Government revenue. No rules, however, for conducting the summary enquiry, either before the Civil Courts or before the Collectors had ever been laid down. Considerable oppression resulted from this state of things, the tenants not being sufficiently protected from the landlord; and the landlord not being sufficiently protected from the Collectors.

In 1857 a Bill was introduced into the Legislative Council of India, with a view to enlarge and define the jurisdiction of the Collectors, with respect to summary suits for arrears or exactions of rent, and generally with respect to the law regulating the relations of landlord and tenant. The Collector was considered to be the person most deeply interested in promoting this branch of the administration of civil justice, being best acquainted with the fiscal state of the district, with the tenures prevailing in it, and with the character of the landlords. The Bill gave to the revenue officers exclusively the primary cognizance of all cases of ejectment, cancelment of leases for arrears of rent, enhancement of rent, and right of demanding pottahs and kubooleuts.

Further
extension
of the
Collector's
jurisdiction

As the law stood before that Bill, the Civil Courts, and not the revenue officers, had jurisdiction to try

LECTURE
VII.

suits for the delivery of pottahs or kubooleuts, or for the determination of the rates of rent at which such pottahs or kubooleuts ought to be delivered, and also over all suits in ejectment, or to cancel a lease for non-payment of rent, or for breach of conditions of any contract involving a liability to ejectment or cancelment of a lease. Collectors and Deputy Collectors, therefore, it was proposed should acquire a still greater portion of the jurisdiction of the Civil Courts than they had previously obtained under the Regulations of 1824 and 1831.

Suits cognizable by the Collectors under Act X of 1859.

The Bill became law in 1859, being Act X in that year passed by the Governor-General in Council. It provided in the 23rd section that the following suits should be cognizable by the Collectors of land revenue, and should be instituted and tried under the provisions of that Act, and except in the way of appeal as therein provided, should not be cognizable in any other Court, or by any other officer, or in any other manner:—*

(1) All suits for the delivery of pottahs or kubooleuts, or for the determination of the rates of rent at which such pottahs or kubooleuts are to be delivered.

(2) All suits for damages on account of the illegal exaction of rent, or of any unauthorized cess or impost, or on account of the refusal of receipts for rent paid, or on account of the extortion of rent by confinement or other duress.

* Section 23.

(3) All complaints of excess in demand of rent, and all claims to abatement of rent.

(4) All suits for arrears of rent due on account of land either kherajee or lakheraj, or on account of any rights of pasturage, forest rights, fisheries, or the like.

(5) All suits to eject any ryot, or to cancel any lease on account of the non-payment of arrears of rent, or on account of a breach of the conditions of any contract by which a ryot may be liable to ejectment, or a lease may be liable to be cancelled.

(6) All suits to recover the occupancy or possession of any land, farm or tenure, from which a ryot, farmer or tenant, has been illegally ejected by the person entitled to receive rent for the same.

(7) All suits arising out of the exercise of the power of distraint conferred on zemindars and others by the Act,* or out of any acts done under color of the exercise of the said power as hereinafter particularly provided.

(8) All suits by zemindars and others in receipt of the rent of land against any agents employed by them in the management of land, or collection of rents, or the sureties of such agents for money received, or accounts kept by such agents in the course of such employment, or for papers in their possession.

In the performance of their duties under the Act, the Collectors and Deputy Collectors, so far as these

Control
over the
Collectors.

* See Sections 112 and 114.

LECTURE
VII.

latter are vested with any powers thereunder, are rendered subject to the general direction and control of the Commissioners and the Boards of Revenue. And the Deputy Collectors are placed under the direction and control of the Collectors to whom they are subordinate. Appeals are allowed in certain cases from the Deputy Collector to the Collector, and from the Collector to the Commissioner. Orders passed in appeal by a Commissioner or a Collector are not open to any further appeal, but the Board of Revenue or the Commissioner may call for any case, and pass such orders thereupon as they may think fit. A Collector's decree is not appealable if for money below Rs. 100, unless the decision involves some question of right to enhance rents or some question relating to a title to land.

Opposition
to the
passing of
Act X of
1859.

Mr. Peacock strongly opposed the passing of the 23rd section, which took away the jurisdiction of the Civil Court, and transferred so many suits to the exclusive cognizance of the revenue officers. He objected to abolishing the jurisdiction of the Civil Courts, and also to the competency of the revenue officers to exercise this new jurisdiction, and he pointed out that the object of Regulation VIII of 1831 appeared to be to encourage regular suits in a Civil Court, rather than summary suits before a Collector when the law gave an option. Mr. Peacock and Sir Charles Jackson recorded their dissent from the Bill, on the ground that it invested

the revenue authorities with power to try the suits between landlord and tenant, and deprived the regular Civil Courts of their jurisdiction, notwithstanding that the suits might involve difficult questions of law and fact.

LECTURE
VII.

The consequence of Act X of 1859 was found to be that cases involving difficult and intricate points of law, and concerning important interests in land, came on for adjudication before Collectors and their subordinates, and it soon appeared that such officers were thereby entrusted with work of more difficulty and responsibility than was suited to their official knowledge and experience.

Conse-
quences of
the Act.

In ten years from the date of that Act, notwithstanding the familiarity with that class of cases which time had brought to the Collectors and their deputies, the Bengal Legislative Council passed an Act (VIII of 1869), which authorized the transfer of the jurisdiction to hear and determine them back again to the Civil Courts; which Courts were to accept the procedure of the Civil Procedure Code with a few modifications, such as the nature of the subject required. All suits which, under Act X of 1859, were triable by Collectors of land revenue, were under the later Act transferred to the cognizance of the Civil Courts. The Act, however, can only be put in force in the Lower Provinces, the local Legislature having no power to pass laws for the North-Western Provinces of the Bengal Presidency.

Third se-
paration of
Civil and
Revenue
jurisdic-
tion.

LECTURE
VII.Bengal
Act VIII
of 1869.

Act VIII of 1869 passed by the Lieutenant-Governor of Bengal in Council, and called "The Landlord and Tenant Procedure Act, 1869," takes effect in those districts in the Lower Provinces of Bengal to which it is extended by order of the Governor-General published in the *Calcutta Gazette*. By an order published on March 2, 1870, the Act has been applied to the districts noted below.*

Thereupon in the places mentioned in that order the jurisdiction of the Collectors to entertain civil suits, under Act X of 1859 and Act VI of 1862, passed by the Lieutenant-Governor of Bengal, ceased save as regards any suits or proceedings then pending before them; and it was enacted that all suits brought for any cause of action arising under either of those Acts, or under Act VIII of 1869, should be cognizable by the Civil Courts in those places according to their several jurisdictions. The limits of the jurisdiction were defined in Sections 35 and 36 of the new Act.

Further
history of
the Civil
Courts.

Having thus traced the progress of rivalry between the Civil and Revenue Courts, I must now recur to the history of purely judicial institutions.

The powers of the Civil tribunals had been gradually extended so as to include European

* *Bhaugulpore*—Bhaugulpore, Monghyr, and Purneah; *Patna*—Patna, Gya, Chumparun, Sarun, Shahabad, and Trihoot; *Rajshahye*—Rajshahye, Bograh, Dinagepore, Maldah, Moorshedabad, Pubna, and Rungpore; *Burdwan*—Burdwan, Bancoorah, Beerbhoom, Hooghly, Howarah, and Midnapore; *Presidency*—Nuddea, Jessore, and 24-Pergunnahs; *Dacca*—Dacca, Backergunge, Furreedpore, Mymensing, and Sylhet; *Chittagong*—Chittagong, Noakhally, and Tipperah.

*British subjects within their jurisdiction.** And with regard to the Sudder Courts of all three Presidencies their jurisdiction was in 1843† extended, and it was enacted that they should entertain special appeals from all decisions passed in regular appeals in all Subordinate Civil Courts, when it should appear that such decisions were inconsistent with law or usage, or the practice of the Courts, or involved doubtful questions of law, usage, or practice.

In 1853 an Act‡ was passed which repealed the Act of 1843 and provided that in all three Presidencies special appeals should lie to the Sudder Court from any decision passed on regular appeal in any of the Courts below on the following grounds ; *viz.*, 1. A failure to decide all the material points in the case, or a decision contrary to law; 2 misconstruction of any document; 3, ambiguity in the decision itself; 4, substantial error or defect in procedure, or in the investigation of the case. No such special appeal was to lie on matter of fact.

Then with regard to the Civil Courts throughout the Presidency of Bengal, the course of legislation had introduced considerable confusion as to the precise functions of some of the Judges. The original legislation on the subject was contained in the Regulations of 1793, the provisions of which

* See *ante*, pages 44 and 45.

† Act III of 1843.

‡ Act XVI of 1843.

LECTURE
VII.

were extended in 1795, 1803, and 1805 to Benares and the Ceded and Conquered provinces. They applied only to the zillah or district Courts, and embraced both law and procedure within their scope. The Courts of Moonsiffs and Sudder Ameens were established, and their procedure laid down by Regulation XXIII of 1814. The Courts of the Principal Sudder Ameens* were established, and governed by Regulation V of 1831. All the provisions contained in those Regulations, with regard to procedure, were repealed, and one general code upon that subject established by Act VIII of 1859.

Necessity
for their re-
establish-
ment.

The Adawlut system itself remained in same obscurity, so far as the legislation on which it rested was concerned, till a very recent period. In order to ascertain the constitution and the jurisdiction of the Civil Courts at any time before 1871, it was necessary to trace out and piece together various bits of legislation which were distributed over no less than thirteen different enactments. Mr. Fitzjames Stephen* thus described the statutory basis of the existing Courts. First of all there were two Regulations in 1793, large parts of which had been repealed and amended and re-amended, what remained of each defined the jurisdiction and procedure of the zillah Courts of Lower Bengal, Patna, Dacca, and Moorsshedabad. Then, with

* Legislative Proceedings of the Governor-General's Council, 1871, p. 87.

regard to the Regulations of the later years, the unrepealed bits of them when discovered applied a similar system to other cities and to the provinces ceded by the Nawab Nazim of Bengal to the East India Company, and finally other enactments purported to extend the same system to the conquered provinces situated within the Doab and on the right bank of the Jumna, and of the territory ceded by the Peishwa. A prolonged course of reading and of the examination and collation of different enactments was necessary before any man could discover what were the Courts that really existed in Bengal.

The Bengal Civil Courts' Act 1871, which I shall hereafter describe, remedied this state of things.

In the Madras Presidency, it appears that the Adawlut system, framed upon the plan of Lord Cornwallis adopted in Bengal, was introduced in the year 1802. The Civil and Revenue Courts were kept distinct. The Registers had jurisdiction to try suits referred to them by the Judge. The Judges could decide finally in suits under 1,000 rupees in value. There were four provincial Courts of Appeal, and the Sudder Court consisted of the Governor in Council, with an appeal from him in suits of the value of 45,000 rupees to the Governor-General in Council. In 1806 the constitution of the Sudder Court was altered, and new Judges

Madras
Courts.

LECTURE
VII.

appointed.* And in 1807 the Governor was declared to be no longer a Judge.†

[inferior
tribunals.

In 1816‡ a Regulation was passed by the local Legislature, in pursuance of which heads of villages were appointed Moonsiffs, with power to try and finally determine suits not exceeding Rs. 10 in value. They were also authorized to assemble village punchayets for the adjudication of civil suits of any amount within their village jurisdictions ; the majority to decide. Another Regulation§ empowered the provincial Courts to annul the decision of the punchayets, and to refer to a second punchayet, whose decision, if it agreed with the former one, was to be final.

In 1843, the provincial Courts of Appeal were abolished.|| New zillah Courts were established and the jurisdiction of the Subordinate Judges and Principal Sudder Ameens was increased so as to include all suits of less value than 10,000 rupees. Such Courts were to have jurisdiction over Europeans, and Americans as well as Natives, and an appeal lay from them to the zillah Judges.

Bombay
Courts.

With regard to the Adawlut system in the Bombay Presidency, it appears that the Court of Directors in 1794 transmitted to the Government

* Regulation IV of 1806.

† Regulation III of 1807.

‡ Regulation IV of 1816.

§ Regulation V of 1807.

|| Act VII of 1843.

of that Presidency a copy of the Regulations proposed by Lord Cornwallis for the internal government of the Bengal provinces ; and eventually, Courts of Civil and Criminal Judicature were constituted by the Bombay Government on principles similar to those on which the Courts in the Presidency of Bengal had been established. In 1827 all the Bombay Regulations passed previously to that year, with few exceptions, were rescinded, and a new code was established by which the system of judicature was entirely remodelled, based however upon the Bengal Regulations of 1793. In 1845 the appointment of Joint Zillah Judges, whenever the state of civil business required it, was authorized.*

The Civil Courts of Bombay, as they continued to exist for a considerable space of time, were constituted by Regulations passed in the first seven years after the Revised Code of 1827 which enacted such modifications of the original system as experience suggested. Those Regulations in turn were subjected to a constant process of partial repeal till the law and constitution of the Courts in Bombay as in Bengal were placed in a most unsatisfactory state. Act XIV of 1869 was eventually passed and constituted the existing Civil Courts of Bombay in a manner which I shall hereafter explain.

It appears that both in Madras and Bombay the revenue officers had the power of trying all

Revenue
jurisdiction
in both
Presiden-
cies.

* Act XXIX of 1845.

LECTURE
VII.

rent suits. From their decisions the appeal lay in the former Presidency to the Zillah Courts; in the latter to the Sudder Court. In 1866 the local legislature at Bombay passed an Act* to divest the Courts of Revenue of jurisdiction in cases relating to the rent of land and the use of wells, tanks, watercourses, and roads to fields and to vest such jurisdiction in the Civil Courts.

* Act II of 1866 (Bombay C.)

LECTURE VIII.

THE PROVINCIAL CRIMINAL COURTS.

Criminal Justice in early times—Sudder Nizamut Adawlut—Mahomedan law—Governor-General supersedes the Nawab Nazim—Police administration in early times—Scheme of Warren Hastings—Civil Judges appointed Magistrate—Further measures—System of 1793—Sudder Nizamut Adawlut—Courts of Circuit—Abolished in 1829—Replaced by Commissioners of Revenue and Circuit—Criminal jurisdiction of Zillah Judges—Sessions Judges—Session's Court Act of 1871—Criminal Justice in Madras—Criminal Justice in Bombay—Sudder Nizamut for the North-West Provinces—Police in Bengal—Supervision of police by Magistrates—Zillah Judges declared to be Magistrates—Police in Benares—Assimilated to Bengal—Police Officers—Darogahs—Mohurrahs—Jenadars—Watchers—Control of Commissioners of Circuit—Police in Madras—Police in Bombay—General condition of the Police—Sir Charles Napier's reform of it in Sind—North-West Provinces—Bombay and Punjab—Oudh—Madras—Act V of 1861.

THE scheme for the administration of criminal as well as of civil justice in Bengal is attributable to Warren Hastings. The principle originally adopted was to retain the Mahomedan law and law officers and Courts for the repression of crime ; subject to the supervision, not apparently very close or effective, of the Government. A scheme of police was also prepared and carried into execution. But in the year 1793 the whole system of criminal and police, as well as of civil, administration was remodelled, by the light of the experience of twenty years.

Criminal
Justice
in early
times.

LECTURE
VIII.

It appears* that Criminal Courts, denominated Foujdary Adawluts, were first appointed in Bengal for the trial of persons charged with crimes or misdemeanours pursuant to the Regulations passed by the President in Council in 1772. The Collectors of Revenue were directed to superintend the proceedings of the officers in those Courts, and on trials to see that the necessary witnesses were summoned and examined, that due weight was allowed to their testimony, and that the decisions passed were fair and impartial.

•
Sudder
Nizamut
Adawlut

A Sudder Nizamut Adawlut was established at Moorshedabad under the superintendence of a Committee of Revenue for the purpose of revising the proceedings of the Provincial Courts in capital cases. It was upon the abolition of that Committee that the Nizamut Adawlut was, for the first time, brought to Calcutta. The history of the Provincial Criminal Courts, down to the year 1775, when the Nizamut Adawlut was carried back to Moorshedabad, has already been described.† The Foujdary Adawluts however did not work successfully under the superintendence of the East India Company's Government; and the discharge of the duties entrusted to the Governor-General, as head of the Nizamut Adawlut or Supreme Penal Court of Calcutta, loaded him with a weight of business and of responsibility,

* See Regulation IX of 1793, Preamble.

† See *ante*, pp. 35, 36, and 38.

from* which he sought to be relieved. The majority of the Council took advantage of this circumstance, to restore to Mohammed Reza Khan the Mahomedan Dewan to whom I have frequently referred, the superintendence of penal justice and of the Criminal Courts throughout the country; and for that purpose, removed the seat of the Nizamut Adawlut from Calcutta back to Moorshedabad.

LECTURE
VIII.

During the fifteen years which elapsed before the Nizamut was again restored to Calcutta, the course of the administration of criminal justice, setting aside the jurisdiction of the Supreme Court, was that the Mahomedan tribunals administered Mahomedan law under the general control of the Nazim, but subject in each Court to the supervision of English authority.

Mahomedan law.

*

In 1790, it was determined by Lord Cornwallis, with reference to the administration of criminal justice,† that “the future control of so important a branch of Government ought not to be left to the sole discretion of any native, or indeed of any single person whomsoever.” That year is an important epoch in the history of this subject. By the Regulations then passed, the powers of the Nabob Nazim passed to the Governor-General in Council, and the system of criminal justice was entirely remodelled.

Governor-General
supersedes
the Nawab
Nazim.

* Mill's History of India, p. 455.

† Beaufort's Criminal Digest, p. 10.

LECTURE
VIII.

Police
adminis-
tration in
early
times.

Before I proceed to explain the nature of the system thus established, it will be necessary to describe the scheme of police administration which had been in force. Originally the zemindars appear to have been the persons who were responsible for* the public safety and the maintenance of the public roads.† There was a clause in the engagement of these landholders and farmers of land by which they were bound to keep the peace; and in the event of any robbery being committed in their respective estates or farms, to produce both the robbers and the property plundered. In 1772, however, the Foujdary jurisdiction of the zemindars was transferred to the Adawluts; for chakaran land had been resumed, and collusion was constantly proved or suspected between the perpetrators of offences and the officers who were maintained by the holders of land.

Scheme of
Warren
Hastings.

Accordingly a general system of police became one of the greatest wants of the country, and Mr. Hastings in 1774 divided Bengal for purposes of police into fourteen different districts. Thannadars were appointed over them, landholders were enjoined to assist, chakaran lands were again applied to their original design; and Foujdars were appointed to apprehend all offenders against the public peace. This system proved a failure, and lasted a very few years.

* See Preamble to Regulation XXII of 1793.

† See Bengal Council Legislative Proceedings, Vol. V., 1871, p. 142, Speech of the Lieutenant-Governor.

LECTURE
VIII.

In 1781 the Foujdars and their subordinate thannadars were abolished, and the Judges of the Civil Courts were invested with the power, as Magistrates, of apprehending and bringing to trial offenders in their districts. Their duty was to forward them to the Darogah of the nearest Criminal Court; the power of punishment still resting with the Nabob's Courts. The zemindar, by special permission of the Governor-General in Council, was sometimes vested with a similar power.

Civil
Judges
appointed
Magis-
trates.

Subsequently the Civil Judges were vested with authority to hear and decide complaints of slight offences, and under certain restrictions to inflict corporal punishment, and impose fines on offenders. And in order to afford the Government some oversight and control over the penal jurisdiction of the country, a new office* was established at the Presidency under the immediate superintendence of the Governor-General. To this office reports of proceedings, with lists of commitments and convictions, were transmitted every month; and an officer under the Governor-General, with the title of *Remembrancer of the Criminal Courts*, was appointed for the transaction of its affairs. "But† the numerous robberies, murders, and other enormities, which continued to be daily committed throughout the country, evinced that the administration of criminal justice was in a

Further
measure.

* Regulation IX of 1793, ss. 31, 33 and 36.

† *Ibid*, see Preamble.

LECTURE
VIII.

very defective state; and as these evils appeared to result principally from the great delay which occurred in bringing offenders to punishment, and to the law not being duly enforced, as well as to other material defects in the constitution of the Criminal Courts; and as it was essential for the prevention of crimes, not only that offenders should be deprived of the means of eluding the pursuit of the officers of justice, but that they should be speedily and impartially tried when apprehended, the Governor-General in Council passed certain Regulations on the 3rd December 1790, establishing Courts of Circuit under the superintendence of English Judges, assisted by Natives versed in the Mahomedan law; for trying in the first instance persons charged with crimes or misdemeanours, and enabling the Governor-General and the Members of the Supreme Council to sit in the Nizamut Adawlut (which was for that purpose again removed to Calcutta) and superintend the administration of criminal justice throughout the provinces." The Regulations so passed in 1790 were, with amendments and alterations, re-enacted in 1793.

System of
1793.

Thus in 1793 the whole criminal and police administration of the country was remodelled in pursuance of previous Regulations. The authority of the Nabob Nazim was abolished, and the Governor-General and Council formed the Sudder Nizamut Adawlut, with the general control of the Courts below them.

By Regulation II of 1801, the Court of Nizamut Adawlut, as well as that of Dewanny Adawlut, which had up to that time consisted of the Governor-General and the Members of Council, was directed to be composed of a Chief Judge and Puisne Judges; and from that time both Courts exercised their functions distinct from the legislative and executive authority of the State. The proceedings of those Courts were not required from that time to be kept in English farther than the Courts might find convenient and conducive to regularity; nor were copies of the proceedings of either Court to be thereafter required, except in cases of appeal to His Majesty in Council, or of reference to the Governor-General in Council. In later years the number of Judges was increased, as in the Sudder Dewanny Adawlut.*

LECTURE
VIII.Sudder
Nizamut
Adawlut.

Next in rank to the Nizamut Adawlut came four Courts of Circuit, subsequently increased in number, as other provinces were added to the Presidency. Each Court was composed of the same Judges who sat in the Provincial Civil Court of Appeal, and of the Cazee, and Mooftie, attached thereto. The duties of the Court of Circuit, including the gaol deliveries at the principal stations, were in ordinary cases performed by the second, third, and fourth Judge, in regular succession, the first Judge remaining at the principal station, unless otherwise ordered to conduct the public business.

Courts of
Circuit.

* Reg. XII of 1811.

LECTURE
VIII.Abolished
in 1829.

These Courts of Circuit continued to exist till the year 1829, when they were abolished by Regulation I of that year. They were considered to have failed to afford prompt administration of justice.

Replaced
by Com-
missioners
of Revenue
and Circuit.

Accordingly, in that year, Bengal was divided into twenty divisions under twenty Commissioners of Revenue and Circuit, who were entrusted with the powers formerly vested in the Courts of Circuit, together with those belonging to the Boards of Revenue; the former to be exercised under the authority of the Nizamut Adawlut, the latter under the control of a Sudder Board of Revenue. The Governor-General in Council was empowered to direct any Commissioner or Judge to hold the sessions of gaol delivery for any city or zillah, with the powers and authority of any Court of Circuit. Commissioners thus became the Criminal Judges in all cases of importance. Two years afterwards it was found that the labors cast upon the Commissioners were too heavy.

Criminal
jurisdiction
of Zillah
Judges.

Thereupon in the year 1831* the Magistrates were authorized to refer to the native officers, that is the Sudder Ameens, any criminal case for investigation, although such Ameens were not authorized to make any commitment. By another Regulation of that year, † Zillah and City Judges not being Magistrates were empowered, when ordered by the Governor-General in Council to conduct the duties of the

* Regulation V. of 1831.

† Regulation VII. of 1831.

sessions, to try commitments made by Magistrates, and to hold gaol deliveries for each district at least once in every month. Thus the Criminal Judges of the country were first the Commissioners of Division, secondly, any Civil Judge whom the Governor-General might temporarily appoint to hold sessions, under the Regulation of 1829, or might generally invest with criminal jurisdiction under the Regulation of 1831.

In 1832 it was considered desirable to enable the European functionaries, who presided in the Courts for the administration of criminal or civil justice, to avail themselves of the assistance of respectable natives in the decision of suits, or in the conduct of trials which may come before them. Provision was accordingly made* for referring suits to a panchayet, or for constituting assessors to assist the Judge, the decision however being vested exclusively in the officer presiding in Court.

The practice which grew up under this state of the law was for the local Governments to appoint particular persons to be "District and Sessions Judges."† There are several passages in the Regulation of 1831 and in Act VII of 1835 which assume the existence of such a functionary as a Sessions Judge ; but there is no express legislative authority

* Regulation VI of 1832.

† Legislative Proceedings, 1871, p. 534; Speech of Mr. Fitzjames Stephen.

LECTURE
VIII.

for his existence, nor for the power of the local Governments to appoint him. In the Criminal Procedure Code of 1861, reference is made to a Court of Session, but in Bengal and the North-Western Provinces, the powers which the Sessions Judges assumed to exercise were derived from the old Courts of Circuit. Neither in Madras nor in Bombay were the Sessions Judges directly connected by law with the Court of Session referred to in the Code of Criminal Procedure. The practice of appointing separate persons to be District and Sessions Judges was for a long space of time utterly without authority. But it continued after the repeal in 1868 of the Regulation of 1831 and Act VII of 1835 to which apparently it traced its existence. After that repeal the only law under which a Sessions Judge could be appointed was the Regulation of 1829, which authorized an occasional transference of a Judge to criminal work.

Sessions
Court. Act
of 1871.

It was under this state of things that Mr. Fitzjames Stephen introduced into the Legislative Council the Bengal Sessions Courts Act of 1871. The Act provided for the appointment of Sessions Judges and Additional Sessions Judges by the local Governments in Bengal and the North-Western Provinces. It confirmed the existing appointments, invested the Judges appointed with the character of Courts of Session within the meaning of the Code of Criminal Procedure: it authorized the Lieutenant-Governors to define and vary the local limits of

their jurisdiction; it confirmed all proceedings by the existing Judges, and indemnified them against the consequences of acting without authority.

LECTURE
VIII.

The Act was merely a temporary measure, passed in order to give a legal jurisdiction and existence to the Superior Courts of Criminal Justice which had previously been wanting. It was repealed in 1872, the Criminal Procedure Code of that year constituting all the Criminal Courts of the country.

In the Presidency of Madras a system of administration of criminal justice was introduced in 1802 during the government of Lord Clive's son framed upon the system which prevailed in Bengal. Magistrates and Assistant Magistrates were appointed, with power to apprehend, bring to trial, and in light cases to inflict petty punishment. Four Courts of Circuit were established, and a Chief Criminal Court consisting of the Governor and Council.

Criminal
justice in
Madras.

The system so introduced was afterwards modified and altered. In 1827 Assistant Judges were appointed under Regulation I of that year, and then* were constituted joint Criminal Judges of their zillahs. Native Criminal Judges were appointed in that year, without jurisdiction over Europeans and Americans, and were afterwards called Principal Sudder Ameens. Trial by jury was ordered to be gradually introduced.†

* Madras Regulation II of 1827.

† Madras Regulation X of 1827.

LECTURE
VIII.

The Madras Courts of Circuit were abolished in 1845, and the Judges of Zillah Courts were directed to hold permanent Sessions for trial of persons accused of crimes formerly triable by Courts of Circuit. Natives might be called in to assist either as assessors or as a jury.

Criminal
justice in
Bombay.

With regard to the Presidency of Bombay, the Governor-General in Council in 1797 authorized the local Government to establish Courts of Civil and Criminal Judicature in the Western Presidency, on principles similar to those on which the Courts in the Bengal Presidency had been established. As respects the administration of criminal justice, Mahomedan law did not generally prevail in the Presidency of Bombay. Hindus were tried by their own Criminal law, Parsis and Christians by English law. Judges' and Magistrates' Courts and Courts of Session were established, and the Governor in Council had a right of supervision and control, an appellate jurisdiction, and a power of granting pardon on mitigation of punishment.

In 1827 the Code was passed, revising former Regulations, and establishing the basis of the whole judicial and police system of Bombay. Magistrates and police officers apprehended offenders and punished for slight offences. Zillah Judges and Assistant Zillah Judges exercised criminal jurisdiction ; the Court of Circuit, held by one of the

Foujdary Adawlut Judges, retaining cognizance of the most heinous crimes. A special Court was also established for the trial of political offences consisting of three Judges selected from those of the Sudder Foujdary Adawlut and the Zillah Courts. All those Criminal Courts were authorized to call in the assistance of Natives, and the law which they administered was set forth in a Regulation* defining offences and specifying punishments.

In 1830 the Provincial Court of Circuit was abolished, and the Criminal Judges were vested with the powers of Sessions Judges and Courts of Circuit. Joint Sessions Judges were appointed under Act XXIX of 1845.

In 1827 appeals from the special Court for the trial of political offences which formerly lay to the Governor in Council were transferred to the Foujdary Adawlut, whose order therein was subject to the confirmation of the Government. And in 1841 it was enacted that crimes against the State should be cognizable by the ordinary tribunals.

A Court of Nizamut Adawlut was constituted for the North-West Provinces by Regulation VI of 1831, possessing the same powers as were vested in the Nizamut Adawlut in Calcutta.

Sudder
Nizamut
for the
North-
West
Provinces.

Then, with regard to the administration of police, it was in 1793 at about the same time as the Courts of

Police in
Bengal.

* Regulation XIV of 1827.

LECTURE
VIII.

Circuit were established, placed under the exclusive charge of officers appointed to the superintendence of it on the part of Government. The landholders and farmers of land, who were bound to keep up establishments of thannahdars and police officers for the preservation of the peace, were required to discharge them, and were prohibited from entertaining such establishments in future. They were relieved of responsibility for robberies committed on their estates, unless connivance were proved, or unless they omitted to assist the police.

Supervision
of police by
Magistrates.

The Magistrates divided their zillahs into police jurisdictions, each of which was guarded by a Darogah or Superintendent, with an establishment of officers. The Magistrates appointed Darogahs, and were held responsible for selecting persons duly qualified for the trust. The police officers were directed to apprehend and send to the Magistrates all persons charged with crimes and misdemeanours and vagrants. The Magistrates and police officers of the cities were invested with concurrent authority in their respective jurisdictions. The cities were divided into wards, and guarded by Darogahs, who were subject to the authority of the kutwals of each city.

Zillah
Judges de-
clared to be
Magis-
trates.

Further, the Judges of all the Zillah and City Courts were declared to be Magistrates of the zillah or city under their respective jurisdictions, and the public gaols were placed under their charge.

Shortly afterwards, Assistants were appointed to the Magistrates, with a limited occasional exercise of judicial powers. In 1807 the Magistrates were given an extended jurisdiction, and in 1810* Government was authorized to appoint other persons not being Zillah or City Judges to exercise with them the office of Joint Magistrates. In 1818† their jurisdiction was extended, and they were empowered to try offenders charged with burglary and theft, with a power of imprisonment for a term not exceeding two years.

LECTURE
VIII.

Notwithstanding the introduction of this scheme of Government police, when Benares and other provinces were annexed, they were placed under the management of tehsildars, landowners, and farmers, who were made responsible for robberies committed within the limits of their estates, excepting night robberies on the open roads or in woods.‡ But in 1807 all those provinces were divided into police jurisdictions in a similar manner to that adopted throughout Bengal, Behar, and Orissa. A superintendent of police was first appointed in 1808, and from 1816, in addition to the management of the whole system of police being entrusted to their care, they were directed by Government to submit annual

Police in
Benares.Assimilat-
ed to
Bengal.

* Regulation XVI of 1810.

† Regulation XII of 1818.

‡ Regulation XVII of 1795, Regulation XXXV of 1803, and Regulation IX of 1804.

LECTURE
VIII.
reports of all the police occurrences within their districts.

Police
Officers.

Various rules were, from time to time, enacted respecting the duties of the Darogahs and other subordinate officers of police ; and in 1817, they were all reduced into one Regulation,* the whole system being

* revised, without however introducing any material alteration. The relative rank and general functions of officers on the thannah establishments were defin-

Darogahs.

ed as follows :—The Darogahs exercised a general control over the mohurrahs, jemadars, and burkundazes attached to their respective thannahs. It was declared to be the duty of a Darogah to conform to all instructions he might receive from the Magistrate, to preserve the peace within the limits of his jurisdiction, and to report to him all occurrences connected with the police, and to discover and apprehend offenders, to execute process and obey all orders transmitted

Mohurrahs. to him by the Magistrate. The mohurrah was the second officer at the thannah, his duty being to preserve the records, and write reports, and to exercise the powers of a Darogah in the absence of that

Jemadars.

functionary. The jemadar was the third officer, and could exercise the powers of a Darogah in the absence of both the Darogah and the mohurrah. His duty was to see that the burkundazes were in attendance at their post properly armed, and that all prisoners and property brought to the thannah were duly guarded.

* Regulation XX of 1817.

He acted under the orders of the Darogah. The police officers generally were directed to obey the orders of the superintendents of police and of the Joint and Assistant Magistrates. Village watchmen were directed to be employed within the limits of the authority of the Darogahs, and to be subject to their orders. In those towns and villages where Darogahs were stationed, the duties of watching were performed jointly by the police officers and the village watchmen. The kutwals and police officers in cities and towns were to be guided by the Regulation so far as it was applicable to them. Watchers.

In 1829 when the Courts of Circuit were abolished, the magistracy and the police were placed under the superintendence and control of Commissioners of Circuit, who replaced those Courts and succeeded to their powers. The office of superintendent of police was at the same time abolished,* and its duties were assumed by the Commissioners. In 1837, however, provision was made for re-appointing superintendents of police, who thereupon were empowered to exercise the functions of the Commissioners. Control of
Commis-
sioners of
Circuit.

No general system of police was introduced into Madras when the system of Criminal Administration was first established. The Native system was retained; village watchers everywhere existing Police in
Madras.

* Regulation I of 1829.

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under the superintendence of the headmen of the villages. In some places Darogahs and thannadars were appointed.

But in 1816 a Regulation* was passed, to organize a general system throughout the Presidency. Heads of villages, aided by village watchers, were to discharge the duties of policemen, *i. e.* except in trivial cases, arrest and forward accused persons to the tahsildar or police officer of the district. The tahsildar was the head of the police of the district. Zemindars could be invested with police authority. The Magistrates and their Assistants were generally charged with the maintenance of peace.

Police in
Bombay.

At the same time, a general system of police was established throughout the territories subject to the Bombay Government by which the duties of police, which had originally been confided to the Foujdars and thannadars, were transferred to the heads of villages, aided by watchers. The new system was framed on the same plan, as that adopted in Madras in 1816. In 1820 a Sudder Foujdary Adawlut was established at Surat consisting of four Judges, empowered to take cognizance of all matters relating to criminal justice and the police, and to call for the proceedings of the Criminal Judges or Zillah Magistrates. The Judges were directed to go on circuit.

* Regulation XI of 1816.

By the revised code in 1827, the duties of the police were directed to be conducted by the Judge and Collector of each zillah, the district police officer, and the heads of villages. The Magistrates and their Assistants were empowered to apprehend all persons charged with crimes or offences.

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About twenty years ago the general condition of the police throughout the country attracted considerable attention from the Government.

General
condition of
the Police.

For upwards of half a century, the Magistrate had been charged with the oversight of the police of his district; and as with the increase of business, Magistrates became judicial officers, with extended powers, they were little able to give the police the attention necessary to keep it efficient. Complaints* of their inefficiency and corruption became universal. Whether few or many in proportion to the population, the police was everywhere oppressive and corrupt, undisciplined and ill-supervised. The Magistrates were either inefficient superintendents of police, or if active as police officers, apt to be biased as Magistrates. The earliest attempts at reform were made in the Presidency towns by appointing superintendents of police separate from the Magistrate, and appointing non-official Justices of the Peace, Native and European. The result

* About the time of Lord Wm. Bentinck. See for an historical account of the Indian Police, the speech of Sir B. Frere introducing Act V of 1861 to the Legislative Council of India; from which this *resumé* is taken

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everywhere demonstrated the soundness of the principle of the separation, whilst the Justices of the Peace discharged the duties entrusted to them in a very satisfactory manner.

Sir Charles
Napier's
reform of it
in Sind.

The first real attempt to reform the mofussil police was made in Sind by Sir Charles Napier. Immediately after the conquest of that province, he drew up a plan on the model of the Irish constabulary of which the characteristics were separate organization, complete severance of police and judicial functions, complete subordination to the general government, and lastly discipline not in the nature of parade, but as far as was necessary to effective organization. Its introduction was received with great distrust by the civil officers, but the total suppression of organized violent crime which ensued, and the conduct and efficiency of the Sind police during the mutiny, testified to the soundness of the measure.

N. W.
Provinces.

Lord Ellenborough ordered its extension to the North-Western Provinces, and three police corps were raised to relieve the military of the civil duties previously performed by them. Lord Ellenborough, however, left India, and there the reform stopped.

Bombay
and
Punjab.

In 1847 Sir George Clerk, Governor of Bombay, visited Sind, and recognizing the value of the Sind police, commenced reforms on a similar principle in Bombay, and shortly afterwards Sir Henry Lawrence commenced the re-organization of the police of the Punjab on much the same plan.

The original plan was, however, departed from in many particulars, and a double system of police was created, *viz.* first, the employment of an unorganized body of burkundazes under the Deputy Commissioners as Magistrates; and, secondly, the formation of police corps under the Chief Commissioner, who did no real police work, but were employed on duties which had previously devolved on the regular army. The system, although very costly, was effective, and it was these police corps which so materially assisted Sir John Lawrence to hold the Punjab and retake Delhi. This Punjab police was the model for the police corps of the North-Western Provinces since 1857, and also for the police corps which existed in Oude before the mutiny.

In March 1858, Colonel Bruce submitted, by order of Sir R. Montgomery, a scheme on the Sind model for the police of Oudh, and raised a police force to aid in subduing the country. Three thousand cavalry and twelve thousand infantry took the field with Lord Clyde in 1858, and occupied the country as the army passed over it; and in 1859, the country being thoroughly subdued, Sir Robert Montgomery decided to make the police a purely civil body separate from the military on the one hand, and from the judiciary on the other. This was done, and a constabulary organized for Lucknow on the model of the London police. The success of the measure

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was great and tranquillity complete, and great reductions were made in the extent and expenditure of the police and tehseel establishments.

Madras.

Attention was first drawn to the subject of police reform in Madras by the report of the torture commission, and the result was embodied in the Act passed by the Legislative Council in 1859. The Act had proved most successful in operation, and it struck at the root of one of the great curses of the country, the detention by the police of persons charged with offences often without warrant and for corrupt purposes.

Act V of
1861.

In August 1860, a police commission was appointed in order to secure economy and something like uniformity in matters connected with police. Their report was followed by a Bill being brought into the Legislative Council which subsequently became Act V of 1861.

Its object was to provide for the reorganization and regulation of police throughout India, that is to say, in every place to which the Governor-General should by order extend its provisions. Under it the entire police establishment under a local Government is enrolled as one police force; constituted and paid according to the order of the local Government. The local Government superintends it, while its administration in each general police district is vested in an Inspector-General and his subordinate officers; and throughout the local

jurisdiction of the Magistrate of a district it is vested in a District Superintendent and his subordinates subject to the general control and direction of the Magistrate. The chief police officers may be invested with the powers of a Magistrate. Special police officers may be appointed for such time and within such limits as the Magistrate may think necessary.

The Act does not in any way interfere with the position and privileges of any hereditary or other village police officers, unless such officer shall be enrolled as a police officer under the Act, which cannot be done without his consent.

The duty of police officers is promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority; to collect and communicate intelligence affecting the public peace; to prevent the commission of offences and public nuisances; to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient ground exists.

THE EXISTING JUDICIAL SYSTEM.

LECTURE IX.

THE PRIVY COUNCIL.

Introduction—History of the Privy Council—Growth of its authority—Struggles to repress it—Its extravagant powers under the Tudors—First exercise of appellate jurisdiction over the Colonies—Loss of jurisdiction in England—Nature of the present jurisdiction—Appeals from India—From the Supreme Court—From Bengal Sudder Court—From Madras and Bombay Sudder Courts—Fate of appeals—Power of the Council to entertain appeals—Limited by Legislature—And by Charters—No appeals in cases of felony—Act of William the Fourth—Act of the Governor-General in Council—Charters of the High Court.

I HAVE now completed the history of the Courts and Legislative authorities in India and have described the existing Legislatures. An account of the existing judicial system at present established and in force will complete the subject under discussion.

Introduction.

The highest judicial authority exercised in India, to which all its Courts are ultimately subordinate, is the Privy Council. Although that tribunal sits in London and exercises supreme appellate authority over other Courts than those established in India, yet some account of it is necessary to give a complete view of the Indian system.

The establishment of local Legislatures in India has tended very much to withdraw the regulation

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of Indian affairs from the immediate supervision and control of Parliament. Both in India and in the colonies, it is obviously necessary that the work of legislation should be conducted on the spot. It is impossible that the members of any foreign assembly should possess the experience and knowledge necessary to the task. Apart from the executive government the only institution in England with which India and the British colonies are habitually and directly brought into contact, is the Privy Council, which possesses the ultimate power of controlling the administration of justice. That power belongs in great measure to the Sovereign, and the Privy Council, to whom the exercise of the power is entrusted, has the ultimate appellate jurisdiction in all cases of a certain value which are not under the exclusive cognizance of the House of Lords; that is to say, it entertains appeals from India and from the colonies and also from the Ecclesiastical and Admiralty Courts in England, but not from the English Courts of Common Law and Equity.

History of
the Privy
Council.

It would require a very minute examination of English history to explain how the Sovereign, as represented by the Privy Council on the one hand, and the House of Lords as a distinct branch of the Legislature on the other, became possessed of their respective jurisdictions, dividing between them the ultimate control over the administration of justice. In general terms, however, I may give

a brief outline of that history as it will explain the circumstance of India being subject to the Sovereign in Council rather than to the House of Lords.

For a long period* in the early history of England, there was a great Council or Parliament on the one side, and a select Council which surrounded the King on the other. Legislative and judicial rights belonged to the larger assembly, but were constantly exercised by the smaller Council, who in matters of high importance convened the larger assembly in order to give greater stability to their acts. The assembling of the larger Council, however, gradually fell into disuse. And the fate of judicial authority was chiefly determined by the strong rivalry which grew up between the secular and ecclesiastical powers for the possession of separate and then superior jurisdiction.

Towards the close of the 12th century, the three superior Courts of Common Law, with purely secular jurisdiction, were established. As they became more independent and distinct, the Privy Council, although it inherited strong claims to appellate jurisdiction and a power by virtue of Royal prerogative and early precedent to interfere with the proceedings of the Courts, was obliged to abstain from violating their independence. The Council represented the authority of Government,

* I condense this account from a paper contributed by me to the *Calcutta Review* in 1862.

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from which an insecure state of society required a constant interference. The Courts on the other hand derived their strength from that passionate attachment to law which animated the Saxon people and which inspired unceasing efforts to render that law supreme over the throne and over the executive.

Growth
of its
authority.

The wars of the Roses increased the disorders of society and thereby ultimately strengthened the power of the executive by multiplying the occasions for its interference. During that period the Privy Council increased its authority. Besides the establishment of the three Courts of Common Law, there arose the Court of Chancery with an extensive equitable jurisdiction mostly exercised by Ecclesiastical Chancellors and a right to interfere with the course of law. The Council and the Court of Chancery were for a long period closely connected. The original bond of union was in the person of the Chancellor who presided in both and from whom the process of each originated. According to Sir Francis Palgrave,* for a considerable period the Chancellor never exercised any judicial functions unless when directed by the Council or acting by its authority.

Struggles
to repress
it.

Finally, however, at the end of the fourteenth century, the Court of Chancery gained exclusive cognizance over trusts and all fiduciary relations, and established its independence of the Privy Council.

* Palgrave's Essay on King's Council, p. 25.

Further than that the great Council of older times developed into a Parliament and the House of Lords endeavoured to reconstitute themselves the High Court of English justice. The Commons also aspired to share in the supreme judicial authority, and instances are recorded of their interference. From the time of the establishment of Parliament, statutes were constantly made which were aimed at the authority of the Council and directed to vindicate the right of the free man to the judgment of his peers and to the due course of law. The growth therefore of Parliament, of Chancery, and of the Courts of Common Law tended strongly to restrict the authority of the Council to the discharge of purely executive functions and to reduce the jurisdiction of its members to the narrowest limits. Its proceedings were constantly watched by Parliament, and until the long wars of the Roses had weakened the power of resistance, the authority of the Council remained under strict control.

With the rise of the Tudors, the Council, under the name of the Star Chamber, assumed a power of adjudicating in all causes that might in example or consequence concern the state of the commonwealth. To use the words of Lord Bacon, "as the Chancery had the prætorian power of equity, so the Star Chamber had the censorian power for offences under the degree of capital." The erection of this Chamber was a reactionary movement against the more

Its extra-
vagrant
powers
under the
Tudors.

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feudal principle which regarded the House of Lords as the supreme judicial tribunal. The arbitrary policy of the Tudor princes and the long intermission of Parliaments during the reign of Henry VIII and Elizabeth, favoured the transfer of its powers to the committee of the Privy Council which sat in the Starred Chamber. In point of fact the Council, notwithstanding all the opposition it had experienced under the Lancastrian kings, had at this time achieved a most unconstitutional triumph over the House of Lords.

✓ First
exercise of
appellate
jurisdiction
on the
Colonies.

It was at this time, *viz.*, under the Tudor princes that the Council drew into its own hands and never afterwards lost the exclusive adjudication of appeals from foreign and colonial dependencies of the Crown and from the Channel Islands. It appears that appeals were first granted from Jersey in Henry VIII's reign, and the records of the Privy Council in 1572 present the first instance of the exercise of this jurisdiction. The jurisdiction of the House of Lords had at this time fallen into disuse, partly from the intrinsic decay of the peerage and partly from the frequent intermission of Parliaments.

Loss of
jurisdiction
in England.

Finally, however, the atrocities of the Star Chamber roused a spirit of resistance and occasioned a full enquiry into the position and authority of the Council. The Act of 16 Charles I, c. 10, abolished the Star Chamber and the whole of its cognate jurisdiction, and, notwithstanding four centuries of possession and

established right, the civil jurisdiction of the Privy Council was declared to be a usurpation contrary to the laws of the land. The fervid loyalty of 1660 notwithstanding all the excesses in which it indulged was unable to efface the strong hatred produced by the acts of the Star Chamber or to restore to the Privy Council any portion of its equity or criminal jurisdiction in England.

No question respecting the jurisdiction of the Council survived the revolution of 1688, but the narrow bounds within which it has been restrained are a striking contrast to the whole of its previous career. The only relic of its ancient criminal jurisdiction is its right to examine and commit for high treason, but the power of punishment has entirely passed from its hands. It still issues proclamations and is called upon to meet extraordinary emergencies, and it reserves to itself the right of granting charters. These together with its civil jurisdiction over the colonies and its right to entertain appeals from the Ecclesiastical and Admiralty Courts in England alone remain of its former judicial authority. The result is that the House of Lords has regained since the restoration the whole of the appellate jurisdiction over the English Courts of law and equity. The functions of the House of Lords are, however, according to established usage exercised by a committee of Law-lords, and the functions of the Privy Council are exercised by

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a Judicial Committee established by the Act of William IV. The only result is to effect a division of labour, since under existing circumstances no constitutional principle can be said to be involved in the retention by either body of their particular jurisdiction.

The extent and importance of the jurisdiction still retained by the Privy Council were pointed out by Lord Brougham* in his celebrated speech on Law Reform in 1828:—

Nature of
the present
jurisdiction.

“They determine,” he said, “not only upon questions of colonial law in plantation cases, but also sit as Judges, in the last resort, of all prize causes. And they hear and decide upon all our plantation appeals. They are thus made the supreme Judges, in the last resort, over every one of our foreign settlements, whether situated in those immense territories which you possess in the East, where you and a trading company rule together over not less than 70,000,000 of subjects—or established among these rich and populous islands which stud the Indian Ocean and from the Great Eastern Archipelago—or have their stations in those lands part lying within the tropics, part stretching towards the pole, peopled by various castes, differing widely in habits, still more widely in privileges, great in numbers, abounding in wealth, extremely unsettled in their notions of right, and excessively litigious, as all the children of the new

* Lord Brougham's Speeches, Vol. 2, p. 356.

world are supposed to be, both from their physical and political constitution. All this immense jurisdiction over the rights of property and person, over rights political and legal, and over all the questions growing out of so vast and varied a province is exercised by the Privy Council unaided and alone. It is obvious that, from the mere distance of those colonies and the immense variety of matters arising in them, foreign to our habits and beyond the scope of our knowledge, any judicial tribunal in this country must of necessity be an extremely inadequate Court of Review. But what adds incredibly to the difficulty is that hardly any two of the colonies can be named which have the same law; and, in the greater number, the law is wholly unlike our own. In some settlements it is the Dutch law, in others the Spanish, in others the French, in others the Danish. In our Eastern possessions these variations are, if possible, greater;—while one territory is swayed by the Mahomedan law, another is ruled by the Hindu law; and this, again, in some of our possessions is qualified or superseded by the law of Buddha: the English jurisprudence being confined to the handful of British settlers, and the inhabitants of the three presidencies.”

The first occasion upon which a right of appeal was granted by Royal Charter to the Privy Council from the judgments of the Courts in India was in 1726. The Charter granted by George I in that year

Appeals
from India.

LECTURE
IX.

established the Mayors' Courts in the three presidencies which gave a right of appeal from those Courts, first to the Governors in Council and thence to the Privy Council, where the amount in dispute exceeded the sum of 1,000 pagodas, *i. e.* 4,000 rupees. Both the Act of Parliament and the Charter to which the Supreme Court of Bengal owed its existence reserved a similar right of appeal to the Sovereign in Council. The same right was also reserved in reference to the Recorders' Courts and the Supreme Courts at Madras and Bombay. Any person aggrieved by a decision of any of those Courts in a suit the value of which was over 1,000 pagodas (except in the case of the Supreme Court of Bombay where the value of the suit must have been above 3,000 Bombay rupees) could petition the Sovereign in Council, and the Council was empowered to refuse or admit the appeal and to re-form, correct, or vary such decision, according to the Royal pleasure.

From the
Supreme
Court.

From Ben-
gal Sudder
Court.

Such were the regulations with regard to Courts established by Royal Charter. In 1781 the Governor-General and Council or some committee thereof was appointed the Sudder Court of Bengal and authorized to determine on appeals and reference from the country Courts in civil causes ; and an appeal was given from its decisions in civil suits the value of which should be of £5,000 and upwards. No rules were prescribed by Parliament respecting the appeals so authorized. Rules and orders were

framed by the Supreme Court and approved by His Majesty in Council according to the provisions of the Charter which established that Court. No such power was given by Act of Parliament to the Sudder Court, and consequently Regulation XVI of 1797 was passed in order to provide rules relative to appeals to the Privy Council against decisions of that Court until the King's pleasure should be known thereupon. That Regulation limited the right of appeal in point of time to a period of six months from the date of the judgment, and in point of value to cases where the judgment exclusive of costs of suit was of the value of Rs. 50,000.

In 1818, the right of appeal from the Sudder Courts of Madras and Bombay to the Privy Council was established and in all the presidencies reservation was made of the Sovereign's right to reject or receive appeals notwithstanding any provisions in the Regulations for the purpose of limiting or controlling the exercise of the right of appeal.

From Madras and Bombay Sudder Courts.

It appears that in the sixty years which elapsed from the establishment of the Supreme Court of Calcutta to the Statute of William IV which constituted the Judicial Committee of the Privy Council only fifty appeals were instituted. The majority of those appear to have been from the Supreme Courts, which from the first were looked upon as offshoots from the Courts of Westminster Hall, the suits in them being carried on by English

Fate of appeals.

LECTURE
IX.

counsel and attorneys and the suitors in them being either Europeans or Natives in the habit of close intercourse with Europeans. Both the suitors and practitioners in the Provincial Courts were very little acquainted with the mode of procedure in appeals to England and either shrank from the attempt to prosecute such appeals or from total ignorance as to the necessary proceedings failed either to follow up or to withdraw any appeal which had been commenced.*

When appeals lay to the Governor-General from the different Sudder Courts, decisions had been returned without anything being required to be done by the parties; consequently when appeal cases were transmitted to England, the parties patiently waited for a decision but in vain, and in many cases the property in dispute was eaten up by private and public debt, and the litigants were either ruined or greatly impoverished.

Power of
the Council
to entertain
appeals.

With regard to the power of the Council to entertain appeals and the right of the suitor to prefer them, the general principle is that† the Crown has an inherent general right controlled by Acts of Parliament to admit appeals from its subjects beyond the seas; but that orders in Council and local rules are intended to regulate the manner in which that right shall be exercised.

* Morley's Administration of Justice in India, pp. 144—8.

† Macpherson's Judicial Committee Practice, p. 1.

In some cases it has been considered not only that local rules or general principles do not authorize an appeal (either because the order is not properly appealable, or because the due course has not been followed by the parties) but that they prevent the Privy Council from exercising any discretion in advising the Crown as to admitting one. In other cases, that although an appeal cannot be brought as of right, yet the Privy Council are not precluded from the exercise of their discretion upon the subject. * * * *

A petition for leave to appeal,* where the sum in dispute was of less amount than £500 sterling, was disallowed by the Privy Council, because the Imperial Legislature, of which the King is part, had delegated to the Colonial Legislature the duty of framing provisions on the subject of appeals, and had thus limited the prerogative right which the Crown previously had to receive appeals without reference to the amount in dispute. Limited by Legislation.

And although an appeal might have been brought with the leave of the Supreme Courts in India from their decisions in criminal cases, whether of a grave or of a light character (such as an order discharging a rule for a new trial of an indictment for assault and false imprisonment) yet, upon the principle of the case just stated, it has been held that, as the Charter of Justice of the Supreme Court of And by Charters.

* *Cuvillier v. Aylwin*, 2 Knapp, p. 72.

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Bombay was granted by the Crown in virtue of an Act of Parliament, it must be considered as granted in the execution of the powers conferred by that Act, and that the Crown had not reserved its power of receiving an appeal in cases of felony, except upon leave obtained from the Court below.

In another* case, Lord Brougham observed, in delivering the judgment of the Privy Council, that even independently of the statute "it might be reasonably contended that the Crown may point out the manner in which the general common law right of appeal to it from colonial sentences shall be exercised by a particular mode of enactment in the Charter. It may say there is a right to appeal to the Crown generally. That appeal shall be in civil cases at all times, but shall be in criminal cases only in a certain manner and form, and I shall delegate to my Judges below the right to refuse or to grant it, as they see fit."

No appeal
in cases of
felony.

And in another† case cited, Dr. Lushington remarked, "not only in England but throughout the dominions of the Crown of Great Britain, governed by the law of England, no right of appeal in felonies has ever existed. Nor are we aware that in any one single instance the Crown has ever, by the exercise of its prerogative, granted leave to appeal in any such case."

* Queen v. Alloo Paroo, 5 Moore P. C., 296.

† Queen v. Edaljee Byramjee, 5 Moore P. C., 272.

It is therefore fully settled that in cases of felony when the Supreme Court of Bombay or any of the Supreme Courts in India has not granted leave to appeal, the Privy Council cannot grant or advise the Crown to grant such leave, whether the appeal be from the verdict and judgment, or be confined to matter of error appearing upon the record. The Court below alone has the power of granting or refusing an appeal in such cases.

In 1833, the Act 3 and 4 William IV c. 41 was passed, and under it a permanent Judicial Committee was appointed for the disposal of appeals and other matters referred to them by His Majesty in Council in pursuance of the Act. The committee was composed of the President of the Council and the Lord Chancellor, and several of the Judges of highest rank in the kingdom with power to the Sovereign to add any two Privy Councillors as members of the committee. Exclusive power was given to it to review all sentences of Courts abroad which were formerly appealable to the High Court of Admiralty or to the Commissioners in prize cases in England. In addition to that the entire appellate jurisdiction of the Sovereign in Council was directed to be exercised solely by the Judicial Committee; and power was given to the Crown to refer to the committee for hearing or consideration "any such other matters whatsoever as His Majesty should think fit," in order that they should advise the

Act of
William
the Fourth.

LECTURE
IX.

Crown thereon. Four members of the committee form a quorum, a majority of whom must concur in their report or recommendation. The Crown was empowered to require the attendance at the committee for the purposes of the Act any Privy Councillor who should be a Judge of one of the three superior Courts of Common Law.

They have power to examine or direct the examination of witnesses at discretion ; to remit the cause to the Court below for rehearing, either generally or with respect to certain points ; and upon such rehearing to take further evidence, to admit evidence before rejected or reject evidence before admitted, and to direct issues to be tried in any Court in Her Majesty's dominions abroad.

All appeals were directed to be made within the time fixed by any existing law or usage, or within such time as should be ordered by the Council. Then with regard to the pending appeals (where there had been a delay of two years from the date of their admission) from the Sudder Dewany Adawlut in the East Indies, the Act recited that transcripts of the proceedings had been received, but that the suitors had not duly prosecuted the same to a hearing, and thereupon it empowered the Sovereign in Council to give such directions to the East India Company and other persons as should be thought necessary for the purpose of bringing those appeals to a hearing.

In 1838 an order in Council was issued which limited appeals from the Supreme Courts in India in point of time to six months from the date of the judgment and in point of value to Rs. 10,000 instead of Rs. 50,000.

As soon as the old appeals from the Sudder Courts in India had been determined, an Act was passed* which provided that from the commencement of the year 1846, all appeals admitted by the Sudder Courts should be taken to be abandoned and withdrawn by consent of the parties thereto unless some proceedings therein should be taken in England within two years after the arrival of the transcript.

In 1863† an Act was passed by the Governor-General in Council to regulate the admission of appeals to Her Majesty in Council from certain judgments and orders not subject to the general Regulations. It provided that such appeals should be admitted where the subject-matter in dispute amounted to or exceeded Rs. 10,000, or when the Court which pronounced the judgment or order declares that the case is a fit one for appeal. An appeal may also be made with permission of the Court from an interlocutory judgment. But the power given by the Act is expressed to be subject to such rules and orders as are in force or shall subsequently be passed by Her Majesty in

Act of the
Governor-
General
in Council.

* 8 & 9 Vict. c. 30.

† Act II of 1863.

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Council. It also expressly declares that nothing in the Act contained shall be understood to bar the full and unqualified exercise of Her Majesty's pleasure upon all appeals to her, either in rejecting any she may consider inadmissible or in receiving any she may judge admissible.

Charters of
the High
Courts.

The Charters of the High Courts give a right of appeal to suitors in any matter not being of criminal jurisdiction, from any final judgment, decree or order of those Courts made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by a majority of the full number of Judges, or of any Division Court from which an appeal does not lie to the High Court itself. The right so conferred is subject to the proviso that the sum or matter in dispute is of the amount or value of not less than Rs. 10,000, or that such judgment, decree or order shall involve directly or indirectly some claim, demand or question to or respecting property amounting to or of the value of not less than Rs. 10,000, or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid when the High Court shall declare that the case is a fit one for appeal.

The High Courts under the Charter may grant leave to appeal to the Privy Council from any preliminary or interlocutory judgment, decree or order or sentences in any matter not being of criminal jurisdiction.

Further, a power of appeal is given (provided the High Court declares the case is a fit one for such appeal and under such condition as it may establish or require) from any judgment, order or sentence of the High Court made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the High Court.

The High Court is directed by its Charter in all cases of appeal to certify and transmit to the Privy Council, a true and correct copy of all evidence, proceedings, judgment, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the Court. A copy of reasons given by the Judges for or against the judgment or determination appealed against was also directed to be certified and transmitted. The High Courts are also bound to execute the judgments and orders of the Privy Council.

LECTURE X.

THE SUPERIOR COURTS.

Separation between Courts of Presidency Town and Mofussil—In laws and procedure—First attempts to amalgamate them—Abolition of Supreme Courts—Bill introduced to establish High Courts—Indian High Courts' Act—Charters of the High Court—Civil jurisdiction of Bengal High Court—Original—Extraordinary original—Appellate—Insolvent—Criminal—Maritime—Testamentary and intestate—Matrimonial—Madras and Bombay High Courts—North-West Provinces—Result of the establishment of High Courts—Punjab Chief Court—Retention of the old Presidency Town System—Insolvency Courts—Insolvency jurisdiction in the Mofussil—Vice Admiralty Courts—Divorce Courts.

Separation
between
Courts of
Presidency
Town and
Mofussil.

HITHERTO I have endeavoured to trace the history of the judicial institutions which were established in the Presidency Towns and Mofussil, to account for their wide separation, their dissimilar origin, their long retention, and the very slight tendency towards amalgamation which they had exhibited. The inconveniences of such double system were numerous, but the differences in the procedure observed, and in the laws administered by these rival institutions, as well as the existence of a strong party feeling in favor of maintaining tribunals which should exercise exclusive jurisdiction over Europeans, rendered such system extremely difficult to abolish.

With regard to the laws administered, the Courts established by the Crown and Parliament for the most part applied English law, both civil and criminal; exceptions being made in favor of Hindus and Mahomedans, that in suits against parties of either of those religions, by whomsoever they might be brought, whether by Europeans or Natives, the law of the defendant should prevail. Their proceedings also were governed by the English law of procedure. Until 1834, they for the most part were amenable only to the legislative authority of Parliament, and to such Regulations of Government as the Supreme Courts might choose to acknowledge and register.

LECTURE
X.
In laws
and procedure.

The Mofussil Courts, on the other hand, had nothing to do with English law, but were amenable in all respects to the Regulations of Government, and when Hindu or Mahomedan law did not apply, or when no Regulations were applicable, were directed to proceed according to justice, equity, and good conscience. That is to say, in cases for which no law was provided, the Judges were authorized to use the best discretion they possessed. Originally the number of cases for which no specific law existed, must have been considerable. For, setting aside Hindu and Mahomedan law, there was no law of contract, no law of succession, no territorial law, no law of evidence, no law of administration of deceased estates. The wide field, from which all

LECTURE
X.

specific law was absent, was gradually reclaimed, as it were, and brought within the limits of civilization. But the process was very gradual, and until the establishment of the Indian Law Commission and the Imperial Legislature in 1834 could hardly be said even to have commenced. From that date however it proceeded very slowly, and it is only within the last few years—and I had almost said the last two or three years—that any serious progress has been made.

The procedure of those Courts was such as was from time to time prescribed by the Regulations, which, by the constant process of repeal and amendment, at last gave a very uncertain and obscure expression to the rules which they provided.

First attempts to amalgamate them.

Before the work of amalgamating these two rival sets of judicial institutions could possibly be proceeded with, it was absolutely necessary to make some attempts to bridge over the wide gulf which separated the laws which they respectively administered, and the procedure which they respectively observed. The abolition of the East India Company, the assumption of direct responsibility of government by the English Crown, and the consolidation of the Indian Empire under the Queen, which occurred in 1858, favored the work of amalgamation which the influences of a century had impeded and prevented. Policy suggested that in re-establishing and consolidating the new empire something

more was required than an imperial army, government, and legislature. A uniform criminal law, a uniform system of Courts, of civil and criminal procedure, and in the end a uniform civil law, so far as exclusive rights to personal laws, based upon religion, would permit, and as far as practicable, equal liability to the jurisdiction, were required as a basis upon which to found a just as well as an imperial administration.

In the next three years after the proclamation of the Queen, first the Civil Procedure Code, and then the Criminal Procedure Code, and almost immediately afterwards the Penal Code, all of which had been long in preparation were enacted. They applied to the whole empire, and all Courts were governed by the procedures therein laid down, except the Supreme Courts and those established by Royal Charter.

When these Codes had been passed, a very long stride had been made in the direction of one uniform system for the administration of justice in India. The next step was to abolish the Supreme Courts in the three Presidencies and the anomalous procedure observed in them and constitute in each Presidency town a High Court of Judicature which should be supreme over all the Courts both in the Presidency towns and also in the Mofussil. The plan had long been in contemplation; in fact the continued existence of the Supreme Courts, alien

Abolition
of Supreme
Courts.

LECTURE
X.
— as they were from the rest of the judicial system, was due to the high character they had maintained and the confidence which was reposed in them by the public and to the divergence in law and procedure to which I have referred, and to the long delays in maturing and passing the three Codes mentioned above.

Bill introduced to establish High Courts.

Those three Codes were passed respectively in the years 1859, 1860, and 1861, and in the last of those three years a Bill was introduced into Parliament for the establishment of the High Courts. As far back as 1852-53 in the evidence which was given before the Committee which sat on East Indian affairs, a strong opinion was expressed by those most competent to give it that it was desirable with a view to the better administration of justice in India that the Supreme and Sudder Courts should in each Presidency be consolidated into one, so as (in the stereotyped phraseology) to unite the legal training of the English lawyers with the intimate knowledge of the customs, habits, and laws of the Natives possessed by the Judges in the country.

When Sir Charles Wood introduced the Bill of 1853, he was anxious to include a provision for effecting that object, and to empower Her Majesty to issue her Charter for the establishment of a united Court. But the members of the Indian Law Commission, though they approved of the proposed change, thought that it would be useless to attempt

to unite the Courts till the Codes of Procedure were established. A Royal Commission, however, was issued to obtain the basis on which the forms of procedure could be framed.

LECTURE
X.
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It is worth while to observe that Sir Charles Wood, in introducing the Bill of 1861 into the House of Commons, laid special stress on the advantage of the Judges of the new* Courts going on circuit to try criminal cases. He said "We shall have one Supreme Court, one sole Court of appeal instead of two ; and, inasmuch as the administration of justice in the minor Courts depends on the mode in which the appeals sent up from them are treated, the superior Court, thus constituted, will, I hope, improve the administration of justice generally throughout India. It is notorious that the greatest confidence is felt by the Natives in the administration of justice by the Supreme Court even at present. Now, according to the provisions of this Bill, the Judges of the Supreme Court may be sent on circuit throughout the country. The effect of this will be that in important cases occurring in the various districts, justice as in this country will be administered on the spot by a trained Judge. At present if an Englishman commits a crime which may subject him to serious punishment, he and all the witnesses must be brought to Calcutta and the case must be tried there. In

* Hansard, 1861, p. 647.

LECTURE
X.

future an English Judge going into the country will be able to try these cases. At present when a crime is committed up-country by a European, the necessity of bringing him to Calcutta amounts in many cases to an absolute denial of justice. It may be impossible in a country like India to bring justice to every man's door, but at all events the system now proposed will bring it far nearer than at present; and when criminal offences are committed by a European—happily such instances are rare—the impartial administration of justice on the spot will produce a most desirable influence on the minds of the Natives.”

Indian
High
Courts'
Act.

The Act was speedily passed, and by it the Crown* was empowered to establish by Letters Patent at Fort William in Bengal a High Court of Judicature for the Bengal division of the Presidency of Fort William and also by similar Letters Patent High Courts at Madras and Bombay; and it was enacted that upon the establishment of such High Court the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut or Foujdary Adawlut should be abolished. The jurisdiction and powers of the High Courts were to be fixed by the Letters Patent. The High Court was empowered to provide for the exercise of its jurisdiction, original and appellate, by one or more Judges or by division Courts constituted by two or

* 24 & 25 Vic., c. 104.

more Judges. It was vested with superintendence of all Courts which might be subject to its appellate jurisdiction, with a general power to issue rules to regulate their practice and proceedings and for the general conduct of their business. The sanction, however, of the Governor-General in Council or of the Governor in Council was rendered necessary. The Crown was also empowered to establish a High Court in the North-Western Provinces.

Thereupon Charters were issued in 1862, and afterwards new Charters in 1865, constituting the High Courts at Bengal, Madras, and Bombay.

Charters of
the High
Court.

That at Bengal was vested with ordinary original civil jurisdiction within the local limits of Calcutta, or within such local limits as might from time to time be prescribed by competent legislative authority for India. Suits of every description were brought within their cognizance, except cases in which the Small Cause Court would have jurisdiction and in which the debt or damage or value of the property sued for does not exceed Rs. 100. The circumstance necessary to give jurisdiction is that, if the land must be situated, or the cause of action must have arisen, or the defendant must, at the time of the commencement of the suit, dwell or carry on business, or personally work for gain within the local limits of Calcutta. If only part of the cause of action were within those limits, then the leave of the Court must be obtained before

Civil juris-
diction of
Bengal
High
Court.

Original.

LECTURE
X.

the institution of the suit. It has been held* that, if part of the land was situated within, and part without, the local limits, the High Court would nevertheless have jurisdiction.

Extraordi-
nary origi-
nal.

Its extraordinary original jurisdiction enables the Court to remove and to try and determine any suit falling within the jurisdiction of any Court, subject to its superintendence, whether within or without the Bengal division of the Presidency either on the agreement of the parties to that effect or for purposes of justice, the reasons for so doing being recorded on its proceedings. Several causes of action between the same parties not being for land or other immoveable property may be joined together in one suit and tried by the High Court if any one of those causes of action is within the High Court's jurisdiction.

Appellate.

The High Court of Bengal was also constituted a Court of Appeal from the Civil Courts of the Bengal division of the Presidency and from all other Courts subject to its superintendence. It also has the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, whether within or without the Bengal division of the Presidency as was formerly vested in the Supreme Court.

* *Prasannamayi Dasi v. Kadambini Dasi*, 3 B. L. R. (O.J.), 85, Norman, J. On appeal before Peacock, C.J., and Markby, J., the question of jurisdiction was not disputed.

As an Insolvent Court, it only has jurisdiction within the Bengal division of the Presidency.

LECTURE
X.

Insolvent.

Criminal.

Its criminal jurisdiction is in respect of all persons within and without the limits of the Bengal division, and not within the limits of the criminal jurisdiction of any other Court and over whom the Supreme Court formerly had jurisdiction. It also has extraordinary original criminal jurisdiction over all persons who reside in places within the jurisdiction of any Court formerly subject to the superintendence of the Sudder Nizamut Adawlut in Calcutta upon any charge preferred by the Advocate-General or by any Magistrate or other officer specially empowered by the Government on their behalf. It is also constituted a Court of Appeal from the Criminal Courts of the Bengal division of the Presidency and from all other Courts subject to its superintendence. It is also a Court of reference and revision from the Criminal Court subject to its appellate jurisdiction.

It is also vested with such civil and maritime jurisdiction as might formerly have been exercised by the Supreme Court as a Court of Admiralty or by any Judge of that Court as Commissary to the Vice-Admiralty Court and also for the trial and adjudication of prize causes and other maritime questions arising in India as were formerly vested in Royal Commissioners with all the criminal jurisdiction in connection therewith.

Maritime.

LECTURE
X.Testament-
ary and
intestate.

It also succeeded to the powers of the late Supreme Court in relation to the granting of probates of last wills and testaments and letters of administration of the goods, chattels, credits, and all other effects whatsoever whether within or without the Bengal division of the Presidency, except such as are within the limits of the jurisdiction for that purpose of any other High Court.

Matrimo-
nial.

It also is vested with jurisdiction in matters matrimonial between Her Majesty's subjects professing the Christian religion.*

Madras
and Bom-
bay High
Courts.

The first Charter of the Madras and Bombay High Courts bears date the 26th June of 1862. They were subsequently superseded by a further Charter of the same date as that which applies to Calcutta. They are similar in all respects to the Calcutta Charter, *mutatis mutandis*. The local limits of the ordinary civil original jurisdiction of either Court are such as may be fixed by a law of the Governor in Council, and until so fixed were the limits of the jurisdiction of the Supreme Court at the date of its abolition. The criminal jurisdiction extends over the limits just described and also over all persons beyond those limits who were subject to the criminal jurisdiction of the Supreme Court.

North-
West Pro-
vinces.

In March 1866 Letters Patent were issued establishing a High Court in the North-Western Provinces

* The date of the first Charter of the Bengal High Court is 14th May 1862; and of the second, 28th December 1865.

of the Bengal Presidency. The civil procedure of that Court was directed by the Charter to be governed by Act VIII of 1859, but its procedure, both civil and criminal, is now regulated by certain amending Acts, relating exclusively to that Court, *viz.*, Act XXIV of 1866 and Act XIII of 1869.

LECTURE
X.
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The result of the establishment of the High Courts was to combine the Judges of the Supreme and Sudder Courts, and thereby to constitute a single tribunal. But as far as the policy of fusing two rival systems of judicial administration was concerned, no great advance was thereby made. The Supreme Court in reality survived as a distinct branch of the High Court, *viz.*, in its original side. The local extent of its jurisdiction, however, was confined within the limits of Calcutta; neither the agreement of parties, nor the national character of individuals being any longer sufficient to give the Court a power of adjudication. The law or equity which it enforced on its original side is the same as would have been applied by the old Supreme Court, and is distinct from the rules of law, equity, and good conscience applied by the appellate side which succeeds to the old Sudder Court. The Criminal and Admiralty, Testamentary, and Matrimonial jurisdictions of the High Court in its original side are precisely the same as those exercised by the tribunal to which it succeeded. Its criminal procedure, too, remained distinct from that of the appellate side. The real

Result of
the estab-
lishment of
High
Court.

LECTURE
X.

innovation was that the civil procedure of the old Supreme Court was swept away, and Act VIII of 1859 was substituted as the Code uniformly and universally applicable throughout India.

Uniformity, therefore, in the criminal law (the Penal Code having come into force on 1st January 1862) and in the civil procedure of all Courts, and in civil and criminal appellate authority dates from 1862.

The establishment of these High Courts and the passing of the Indian Councils' Act, 1861, seem to have led to a general reconstitution of Courts of judicature throughout the country both in the regulation and in the non-regulation Provinces. In the Punjab, a Chief Court has been established, which is framed very much upon the model of the High Courts. It derives its existence from an Act of the Imperial Legislative Council, instead of a Royal Charter, and the Judges who compose it are appointed by the Governor-General in Council, and not by Her Majesty. It came into existence about the same time that the High Court of the North-West Provinces was established by Royal Charter.

Punjab
Chief
Court.

It was established by Act IV of 1866 which was passed with the previous sanction of the Secretary of State for India in Council to amend the constitution of the Judicial Commissioners' Court. The new tribunal was invested with an original jurisdiction for the trial of certain civil and criminal cases.

It consists of two or more Judges including the Judicial Commissioner of the Punjab. They hold their offices at the pleasure of the Governor-General. The Chief Court is the highest Court of Appeal from the Civil and Criminal Courts in the Punjab. Its jurisdiction, however, is barred when during a settlement of land revenue the local Government invests the Financial Commissioner with the power of a Court of final appeal in a certain class of cases. Its proceedings are regulated by the Civil Procedure for the time being in force in the Punjab; and in exercising its jurisdiction it is bound to apply the rules of law or equity and good conscience which the local Court would have applied. It has complete jurisdiction over European British subjects, and it has superintendence over all Courts subject to its appellate jurisdiction.

Thus four High Courts were established for the three Presidencies and a Chief Court for the Non-Regulation Provinces of the Punjab—possessing the highest civil and criminal jurisdiction in the territories for which they were respectively established.

Very little in reality was thereby effected towards amalgamating the Presidency Town and Mofussil systems of judicial organization. But subsequent legislation in this country reconstituted almost all the Civil and Criminal Courts of the country. I shall refer to them hereafter. At present I will

Retention
of the old
Presidency
Town
System.

LECTURE
X.

pass on to institutions which chiefly belong to what I have described as the Presidency Town system, and describe them in detail.

Insolvency
Courts.

With regard to the establishment of Courts for the relief of insolvent debtors in British India, they were first established by Act* of Parliament in 1829. They were directed to be holden from the 1st of March 1829 once a month at least throughout the year, and oftener, if need be, in Calcutta, and as often as found necessary within the towns of Madras and Bombay, by any one Judge of the Supreme Court of the Presidency. Though presided over by a Judge of the Supreme Court the Insolvency Court had a distinct and separate existence. An appeal lay from it under the statute to the Supreme Court. It was empowered to administer oaths, and to examine witnesses on oath or affirmation, to issue commissions to take evidence, to force the attendance of witnesses, and to examine debtors and parties capable of giving information as to their debts and estates. It was also empowered to impose fines in a summary manner, and to commit to gaol for contempt of Court, but not to award costs except under the rules of the Supreme Court. The Supreme Court was also vested with power to make rules to facilitate the relief of insolvent debtors in cases for which sufficient provision had not been made

* 9 Geo. IV., c. 73.

in the Act. Four years was the period assigned as the duration of the Act, which was afterwards extended by subsequent enactments to the year 1848 when the Act was repealed; the Insolvent Courts however being at the same time re-established.

Previous to the establishment of those Courts by the Act of 1829, an Act of Parliament* passed in the year 1800 was the basis of jurisdiction to grant relief to insolvent debtors in India. It empowered the Supreme Courts at Fort William and Madras and the Recorder's Court at Bombay to make rules and orders, extending to insolvent debtors in India the relief intended by an Act of Parliament called the Lords' Act, passed in 1759. It ratified all rules and orders previously made by the Supreme Courts for granting such relief and confirmed the acts done under such rules and orders.

In 1848† an Act of Parliament was passed to consolidate and amend the law relating to insolvent debtors in India. It provided that the Courts of 1829 should be continued. Their‡ jurisdictions severally extend to the disposal of all petitions by persons imprisoned within the limits of the Presidency towns upon any process whatever, or who shall reside within the jurisdiction of any of the Supreme Courts and be in insolvent circumstances.

* 39 & 40 Geo. III., c. 79.

† 11 Vict., c. 21.

‡ *Ibid*, sec. 5.

LECTURE
X.Insolvency
jurisdiction
in the
Mofussil.

As regards the Mofussil in general there is no law of insolvency and no Courts for the relief of insolvent debtors. The Civil Courts can, however, under the operation of section 271* of the Civil Procedure Code, effect some of the purposes of insolvency law, subject however to this, that the creditor who first attaches the property of the debtor is entitled to be paid in full while the rest of the creditors are paid rateably. Such a provision leads to a scramble amongst creditors in which an unfortunate debtor or his property stands little chance of quarter or of consideration, while the successful creditor himself cannot justify his priority on any principle of equity or fairness. Some provisions with respect to insolvency are to be found in what is called the Civil Code of the Punjab, and also in Major Spark's Code, a document which has some legal validity in parts of British Burmah. A Bill to amend the law relating to insolvency has been introduced into the Legislative Council of India which will probably create one uniform law on the subject and vest the Courts in the country with the necessary authority to administer it.

* The Section is as follows :—

"If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant, and not obtained satisfaction thereof. Provided that when any property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale."

With regard to Vice-Admiralty Courts in 1800* LECTURE X.
 the Crown was empowered to issue a commission Vice-Admiral Courts.
 from the High Court of Admiralty in England for
 the trial and adjudication of prize causes and all
 other maritime questions arising in India and to
 nominate all or any of the Judges at the respective
 Presidency Towns either alone or jointly with
 others to be the Commissioners for carrying out
 the purposes of the commission. In William the
 Fourth's reign an Act† was passed which gave
 an appeal to the High Court of Admiralty in cer-
 tain cases. It defined the jurisdiction of the Vice-
 Admiralty Court to extend to all cases where a
 ship or vessel or the master thereof should come
 within the local limits of any Vice-Admiralty
 Court; irrespective of the cause of action having
 arisen out of those limits.

A separate Vice-Admiralty Court appears to have
 been established in Calcutta in 1822. The Charter
 of the High Court of Bengal in 1862 contained the
 following clause which was renewed by the Charter
 of 1865. "We do further ordain that the High
 Court of Judicature at Fort William in Bengal shall
 have and exercise all such Civil and Maritime juris-
 diction as may now be exercised by the said
 Supreme Court or a Court of Admiralty or by any
 Judge of the said Court as Commissary to the Vice-

* 39 & 40 Geo. III, c. 79, s. 25.

† 2 Wm. IV, c. 51.

LECTURE
X.

Admiralty Court, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India, as is now vested in any Commissioner or Commissioners appointed by us or our predecessors under the Act of George* III."

Divorce
Courts.

In 1869 the High Courts were constituted by Act IV of 1869 passed by the Governor-General in Council Courts of Divorce of persons professing the Christian religion. The Chief Court of the Punjab alone of the tribunals not established by Royal Charter is vested with a similar jurisdiction, *viz.* the power of granting, upon grounds which would entitle to a divorce in England, a final decree for dissolution of marriage. British Burmah in that respect is placed within the jurisdiction of the High Court of Bengal, and all other Non-Regulation Provinces, and places in the dominion of allied Princes and States are placed in respect of Christian subjects of Her Majesty residing therein under the jurisdiction of the particular High or Chief Court within whose original criminal jurisdiction the petitioner for divorce would have been subject, if a European British subject. The District Courts both in Regulation and Non-Regulation Provinces have also a concurrent Divorce jurisdiction with the High or Chief Courts to whose appellate jurisdiction they are subject, but it does not extend to the making a final decree for dissolution.

* 39 & 40 Geo. III.

LECTURE XI.

THE INFERIOR CIVIL COURTS.

Courts of British Burmah—Recorders' Courts—Existing Courts in Burmah—
Judicial Commissioner—Chief Commissioner—Recorder of Rangoon—
Non-Regulation Territories—Central Provinces—Jhansi Division of the
N. W. P.—Punjab—Oudh—Scinde, Aden and Coorg—Appellate Procedure
in these Courts—Civil Courts in Bombay—Civil Courts in Bengal—Powers
of High Courts over the Civil Courts—Of the District Judge—Madras—
General observations—Small Cause Courts—Act IX of 1850—Act of 1864—
Mofussil Small Cause Courts—Reservation of older Jurisdictions.

As soon as the Legislature was reconstituted under the Indian Councils' Act, and was vested with a complete power of legislation over the Non-Regulation Provinces, it began to provide a system of Courts whose powers and jurisdiction should be based upon its own enactments.

The first country which attracted the attention of the Legislature was British Burmah and by Act I of 1863, six grades of Courts were established in addition to Recorders', and Small Cause Courts. Extra Assistants of the third, second, and first class held the three lowest Courts: then came the Court of the Assistant Commissioner who had the same jurisdiction as the Extra Assistant of the first class. Above these two were the Deputy Commissioner, the Commissioner, and the Chief Commissioner. The Act maintained all the existing classes of Courts

Courts of
British
Burmah.

LECTURE
XI.

in British Burmah, defined the jurisdiction to be exercised by each grade of those Courts and laid down rules for the admission of regular as well as special and second appeals. It extended to British Burmah generally, the Code of Civil Procedure which had already been in force under an order of the Supreme Government in the entire territory except the Province of Pegu. It also extended to Pegu the Limitation Act XIV of 1859.

Recorders'
Courts.

Besides this scheme for the establishment of the local Courts, Act XXI of 1863 was passed apparently with the object of reviving on new soil the old Recorders' Courts which had once flourished in Calcutta, Madras, and Bombay. Under it there was established at Rangoon and Moulmein a Court presided over by a Barrister or Advocate of five years' standing appointed by the Governor-General in Council, with full powers of civil and criminal jurisdiction. The Civil Procedure Code regulated their proceedings in civil suits and they were to apply the law administered by the Bengal High Court in its ordinary original civil jurisdiction. A Registrar was appointed with the powers of a Small Cause Court Judge in certain suits under the value of Rs. 200. An appeal lay to Her Majesty in Council from the Recorder in all cases of the value of Rs. 10,000 or upwards and to the High Court of Bengal in all cases between the value of 3,000 and 10,000 rupees. The Recorder

moreover was vested with all the powers of a Court of Session as defined in the Code of Criminal Procedure within certain territorial limits except that he had no power to try but only to commit to the Bengal High Court any European British subject charged with an offence punishable with death. Increased powers were conferred on the Registrars by Act III of 1866.

* In 1871 a Bill was introduced (which finally became Act VII of 1872) to regulate the Courts in British Burmah. The Chief Commissioner had found that his executive duties prevented him from properly discharging the judicial business thrown upon him. The principal object of the new Act was to relieve him of that burden. A Judicial Commissioner was constituted thereby to be the head of the Judicial system of the Province. A Judge of Rangoon was appointed in lieu of the Recorder; and a Small Cause Court Judge with the powers of a Sessions Judge was appointed in lieu of the Recorder of Moulmein.

Existing
Courts in
Burmah.

The Judicial Commissioner relieves the Chief Commissioner entirely of judicial work and superintends the minor Courts. He has, in civil matters, the powers of the High Court in relation to all Courts in British Burmah except the Recorder's Court of Rangoon, including all Small Cause Courts except that in Rangoon; and in criminal matters he has the powers of a High Court in relation to

Judicial
Commis-
sioner.

LECTURE all Courts in Burmah except those of the Recorder
XI. and Magistrates of Rangoon.

Chief Commissioner. The Chief Commissioner is vested with the powers usually confided to the Local Government of fixing the local limits of the jurisdiction of Courts and conferring special powers under certain restriction upon the Judges.

Recorder of Rangoon. The Recorder of Rangoon holds his Court ordinarily in the Town of Rangoon, but may be directed to hold it either at Akyab or Moulmein for the trial of civil suits or appeals transferred to him, or of criminal cases in which European British subjects are concerned.

Non-Regulation Territories. Then, with regard to the Non-Regulation Provinces of Oudh, the Central Provinces, the Punjab and other territories no attempt had been made to provide distinct and matured systems of judicial administration, such as had been conferred on the three Presidencies. The systems which existed had been hurriedly framed as the territories to which they related were from time to time annexed. The legislation relating to these and other matters was to be found in numerous rules and orders which acquired the force of law under Section 25 of the Indian Councils' Act. The Legislature accordingly proceeded to establish Courts and define judicial authority in those Provinces by its own enactments.

Central Provinces. In the Central Provinces there are eight grades of Courts established by Act XIV of 1865 in

addition to Courts of Small Causes and to any other Courts thereafter to be established. The highest Court is that of the Judicial Commissioner who exercises appellate jurisdiction in cases determined by the Deputy Commissioner and the Commissioner of Division. He possesses the Chief Judicial authority in the country. The lowest Court is that of the tehsildar of the second class with jurisdiction in suits of every description up to Rs. 100 in value ; next to him the tehsildar of the first class with jurisdiction up to Rs. 300 ; next to him the Assistant Commissioners of the third class, the second class and the first class with jurisdiction up to Rs. 500, Rs. 1,000, and Rs. 5,000 respectively ; sixthly the Deputy Commissioner whose original jurisdiction is not limited to any pecuniary amount and who has power to hear appeals from decisions and orders of Courts of the first four grades ; seventhly, the Commissioner who exercises appellate jurisdiction over his assistants and deputies being in turn subject to the appellate jurisdiction of the ~~Assistant~~ Commissioner.

In the Jhansi Division of the North-Western Provinces, there are seven grades of Courts established by Act XVIII of 1867, similar to those established in the Central Provinces ; except that there are no Assistant Commissioners of the third class, and the High Court of the Presidency renders the presence of a Judicial Commissioner unnecessary.

Jhansi
Division
of the
N. W. P.

LECTURE
XI.
Punjab.

By Act XIX of 1865 seven similar grades of Courts were established in the Punjab, *viz.*, a Court of the tehsildar, of three Assistant Commissioners with ordinary special and full powers, a Deputy Commissioner, a Commissioner and a Judicial Commissioner. And by Act IV of 1866 in lieu of the Court of the Judicial Commissioner there was constituted the Chief Court of the Punjab consisting of two or more Judges appointed by the Governor-General in Council.

Oudh.

In Oudh grades of Courts were established by Act XIV of 1865, similar to those provided for the Central Provinces. That Act, however, was framed chiefly with reference to the Central Provinces; it was found incomplete as regards Oudh, and inconvenient, having regard to some subsequent legislation in reference to that territory. Accordingly, in 1871, the Oudh Civil Courts' Act* was passed, which applies to all Civil Courts in Oudh. It constitutes five grades of Courts, *viz.*, those of (1) the Tehsildar; (2) the Assistant or Extra-Assistant Commissioner; (3) the Deputy Commissioner or the Civil Judge of Lucknow; (4) the Commissioner; (5) the Judicial Commissioner. The Governor-General in Council is empowered to fix, and from time to time to vary, the number of Courts of each grade. The general control over all the Courts of the first and second grades in any District is vested in the Deputy Commissioner,

* Act XXXII of 1871.

and the control over the Courts of the first three grades in any division is vested in the Commissioner, subject to the superintendence of the Judicial Commissioner. The Court of the Deputy Commissioner is the principal Civil Court of original jurisdiction in any District, and he may direct the business in the Courts of the first and second grades to be distributed among such Courts as he thinks fit, having regard to the limits of their jurisdiction. He entertains appeals from those Courts except when the amount in dispute exceeds 1,000 rupees, in which case the appeal lies to the Commissioner. Appeals lie also from the Deputy to the Commissioner, and from the latter to the Judicial Commissioner, who is empowered to refer cases in which he entertains any doubt to the High Court of the North-Western Provinces, which latter tribunal is directed to deal with the case so referred as if it were an appeal instituted in the ordinary way.

Courts were also established in Scinde by Act XII of 1861 (Bombay Code), at Aden by Act XI of 1864, and in Coorg by Act XXV of 1868.

The systems thus established in the Non-Regulation Provinces differ chiefly with regard to the procedure adopted in the matter of appeal. In some cases a second appeal on the merits was given, which was in some provinces final, in others liable to a further special appeal. In other cases no right of second appeal was given, but an extraordinary

Appellate
procedure
in these
Courts.

LECTURE
XI.

power of revision was vested in the Appellate Courts. The principle which eventually found most favor with the Legislature, to judge from the discussion upon the Oudh Bill,* was to grant a second appeal on the merits when the Court of first appeal differed from the Court of first instance. In the case of Oudh the further provision was made that such second appeal should in all cases lie to the highest Court of appeal in the Province.

Civil
Courts in
Bombay.

Next with regard to Courts subordinate to these established by Royal Charters granted in pursuance of the Act of 1861, Act XIV of 1869 was passed in reference to the Presidency of Bombay. The law which regulated the constitution of the Civil Courts in that Presidency was considered to be in an unsatisfactory state. It† was contained in unrepealed fragments of Regulations passed in the years 1827, 1830, 1831, 1833, and 1834, which enacted such modifications of the original system as experience suggested; and thus although the law when ascertained was simple enough, it came to be stated in so complicated a way that there were few persons by whom it was thoroughly understood. The new Act reproduced the essential provisions of those Regulations and proposed several amendments and alterations.

It appears that the law‡ relating to Principal Sudder Ameens and Moonsiffs in Bengal had been

* Legislative Proceedings, India, Vol. X, 1871, p. 595.

† *Ibid*, Vol. VIII, p. 11.

‡ Act XVI of 1868.

previously consolidated. The object of the Bombay Act was to effect a similar work of consolidation. In lieu of three grades of Subordinate Civil Judges, Principal Sudder Ameens, Sudder Ameens and Moonsiffs, two grades of Subordinate Judges were established, *viz.*, of the first class with jurisdiction up to Rs. 10,000 and second class with jurisdiction up to Rs. 5,000. The District Judge was enabled to hold his Court at any town in his district. The Subordinate Judges were empowered to hold their Courts in more places than one within the local limits of their jurisdiction.

The Act extends to the territories under the Governor of Bombay in Council other than Scinde in which the Code of Civil Procedure was on the day of the passing of the Act in force; and may be extended by the local Government, which is empowered to fix the limits of districts and to appoint District Judges. It may also with the sanction of the Governor-General in Council appoint in any district a joint Judge with the powers of a District Judge and a jurisdiction concurrent with his; also Assistant Judges to whom the District Judge may refer original suits up to Rs. 10,000 in amount but not appeals; also the Subordinate Judges before mentioned of two classes.

Thus, as regards the Bombay Presidency, the Punjab, the Central Provinces, British Burmah, and other Non-Regulation territories, the entire law by which

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the system of judicial administration was regulated is set forth in the several Courts' Acts relating to those territories; but down to 1871, in order to ascertain in Bengal, and down to the present time, in order to ascertain in Madras the exact constitution and jurisdiction of the Civil Courts, it is necessary, as I have previously shown, to institute a laborious search through the Regulations.

Civil
Courts in
Bengal.

In 1871 it was found expedient to consolidate and amend the law relating to the District and Subordinate Civil Courts in the Lower and North-Western Provinces of the Presidency of Bengal. Accordingly Act VI of that year was passed by the Governor-General in Council called the Bengal Civil Courts' Act, 1871. The Judges of those Courts exercise jurisdiction at the present time under the provisions of that Act. It gives to the local Government power to fix from time to time the number of District Judges and of the Subordinate Judges and Moonsiffs in each district; and on the recommendation of the High Court subject to the sanction of the Governor-General in Council to appoint Additional Judges.

It gives to the District Judge, subject to the superintendence of the High Court, the general control over all the Courts in his district. The local Government is vested with power to fix the local limits of the jurisdiction of any Civil Court under the Act. The Judge or Subordinate Judge has

cognizance over all original suits subject to the provisions of Section 6* of the Civil Procedure Code cognizable by the Civil Courts; but the Moonsiff's jurisdiction is limited to suits not exceeding Rs. 1,000. The District Judge has an appellate jurisdiction in reference to the decrees and orders of Subordinate Judges and Moonsiffs except where the amount or value of the subject-matter in dispute exceeds Rs. 5,000 in which case the appeal lies to the High Court. The High Court also entertains appeals from decrees and orders of District and Additional Judges. The District Judge has power to refer to any Subordinate Judge under his control and subsequently to withdraw from him any appeals pending from the decisions of Moonsiffs.

The local Government has power to suspend or remove for misconduct any District, Additional or Subordinate Judge or Moonsiff.

The powers of the High Court, in regard to these judicial officers, are (1) that in case of urgent

Powers of
High Court
over the
Civil
Courts.

* Section 6. "Every suit shall be instituted in the Court of the lowest grade competent to try it. But it shall be lawful for the District Court to withdraw any suit instituted in any Court subordinate to such District Court, and to try such suit itself, or to refer it for trial to any other Courts subordinate to its authority and competent, in respect of the value of the suit, to try the same, whenever it may see sufficient cause for so doing. In like manner the Sudder Court may order that the cognizance of any suit or appeal which may be instituted in any Court subordinate to such Sudder Court shall be transferred to any other Court subordinate to its authority, and competent, in respect of the value of the suit or appeal, to try the same."

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necessity it may suspend a Subordinate Judge and forthwith report to the local Government the circumstances of the suspension, the final order in the matter resting with the local Government; (2) it may appoint a commission for enquiring into the alleged misconduct of any Moonsiff and according to the result of such enquiry, may suspend him or reduce him to a lower grade; (3) it may suspend him pending the result of the enquiry or it may proceed to punishment without appointing any commission.

Of the
District
Judge.

A District Judge also may, in case of urgent necessity, suspend a Moonsiff and report the circumstance to the High Court with whom the power of making a final order rests. The Judge of every Court has the power of appointing its ministerial officers, the approval of the District Judge being necessary with regard to any appointments in the lower Courts. Their removal or suspension for misconduct or neglect is subject to the ultimate general control of the local Government.

Madras.

In reference to Madras a Bill was introduced into the Council of the Governor-General in June 1870, to consolidate and amend the laws relating to district Moonsiffs. The Bill comprised the re-enactment of the principal portions of the existing law together with some additional provisions taken from the Bombay Civil Courts' Act and the Bengal Subordinate Judges' Act. The Bill, however, has not yet been passed into law.

Such is a short sketch of the existing judicial institutions of India. They are nearly all of them of recent origin, dating their establishment, except in the case of the Madras Presidency, from enactments and Charters which have all been passed in the last few years. As soon as the Acts of the Legislative Council, apart from the old Regulations, become the foundation of all the Courts in India, except those expressly constituted by Royal Charter, the whole may easily be consolidated into one Civil Courts' Code, establishing throughout the country in every province a gradation of Courts similar in title and jurisdiction. At the present time, however, there is a wide difference between the Regulation and the Non-Regulation Provinces in respect of this, that in the latter the officers who hold the different Courts which I have described have executive as well as judicial functions. They divide amongst them almost the whole executive work of their respective provinces. The Judges of the Chief Court in the Punjab and those of the Small Cause Courts are the only Judges in that province who perform exclusively judicial functions. The same plan is observed in Oudh and the Central Provinces, and was till very recently in British Burmah. In the two first there is a Court of a Judicial Commissioner instead of a Chief Court. In the latter there was a Chief Commissioner, who was also head of the Executive, but under the recent Act,

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there is a Judicial Commissioner, whose functions are purely judicial.

The mode in which these Courts are* placed in regular degrees of subordination, is exhibited by the general law of appeals, which so far as the chief appellate authority is concerned, depend upon the High Courts' Charters and Act XXIII of 1861, section 23. An appeal to the High Court must be determined by a Bench of two or more Judges. If they differ, the opinion of the senior Judge prevails, and another appeal is given to a Bench of three Judges. The Appellate Court can remand the case for further trial, or it can itself take further evidence.

The actual course of appeal differs in the different provinces. There are in Bengal and the North-Western Provinces four kinds of Judges—Munsiffs, Subordinate Judges, District Judges, and High Court Judges; Sudder Ameens and Principal Sudder Ameens having been abolished, Munsiffs may try cases up to Rs. 1,000, and an appeal lies from their decision to the District Judge.

From the decisions of Subordinate Judges the appeal lies to the District Judge if the value of the case does not exceed Rs. 5,000, and in all other cases direct to the High Court. The original jurisdiction on the other hand of the District Judge is unlimited in amount, including an important miscellaneous

* Mr. Fitz-James Stephen's Minute on the Administration of Justice in India.

civil jurisdiction, as for instance under the Succession Act, the Divorce Act, and the like. The appeal from their decisions lies to the High Court.

In Bombay, Munsiffs, as well as Ameens, are abolished, and there are five kinds of Judges, *viz.*, Subordinate Judges of two classes, *viz.*, those who may try cases up to Rs. 5,000, and those who may try cases beyond that amount; above them District Judges, with their Assistant Judges under them, and their Joint Judges, with concurrent jurisdiction; and finally High Court Judges.

District Judges are the principal Courts of original civil jurisdiction in the district and are also Courts of Appeal from all decrees and orders passed by Subordinate Courts, except from decrees above Rs. 5,000 in which case the appeal lies to the High Court. There are also Joint Judges and Judges having concurrent jurisdiction with District Judges, but doing such civil business only as they receive from the District Judge or the High Courts.

Assistant Judges are subordinate to the District Judges, and may try any cases referred to them by the District Judges not exceeding Rs. 10,000, and not being in the nature of appeals. An appeal lies from such Assistant, as from a subordinate first class, to the District Judge in cases under Rs. 5,000, and in cases exceeding that amount to the High Court.

In Madras the Munsiffs have at present original jurisdiction up to Rs. 1,000, which it is proposed

LECTURE
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to raise to Rs. 2,500. An appeal lies to the District Judge, who, however, may refer the case for hearing to the Principal Sudder Ameen. The Principal Sudder Ameens have original jurisdiction up to Rs 10,000. An appeal lies in all cases to the District Judge. The District Judges have unlimited civil jurisdiction, with an appeal to the High Court.

Small
Cause
Courts.

Besides the judicial organization which I have just described, the Courts of the country include a variety of tribunals established for the purpose of adjudicating upon small causes in a less expensive and more expeditious manner than is possible in those which have been described in this and in the last lecture. A sketch of these will conclude the account of the existing Civil Courts of British India.

The Courts of Small Causes in the Presidency towns, as they now exist, were established under Act IX of 1850. They are the successors of the old Courts of Requests, which were established at Calcutta, Madras, and Bombay in 1753, by the Charter of George II; the limit of their jurisdiction being originally five pagodas, subsequently, in 1797,* extended to Rs. 80. Three years later an Act† of Parliament was passed to enable the Governors of those Settlements to extend the jurisdiction of those Courts to Rs. 400 sicca, to alter and reform the constitution and practice of the Courts, and

* 37 Geo. III, c. 142, s. 30.

† 39 & 40 Geo. III, s. 17.

to frame new rules and orders. By proclamation, in pursuance of this Act, Commissioners were appointed for the recovery of small debts in Bengal, and the jurisdiction of the Court was extended in 1819 to Rs. 400 sicca. The Courts of Requests at all the Presidencies were, by the Charter of Justice and by the proclamations, placed under the control of the Supreme Court; in the same manner that inferior Courts in England are placed under the control of the Court of Queen's Bench, and they continued to exist till 1850.

LECTURE
XI.

In that year an Act was passed repealing the provisions of George II's Charter, and all Acts made concerning the constitution or practice of the Courts of Requests. Courts of Small Causes were established as Courts of Record, with jurisdiction conterminous with that of the abolished Courts; the Judges were to be appointed by the Governor in Council, and to have cognizance over all suits when the debt or damage claimed or the value of the property in dispute was not more than Rs. 500, whether on balance of account or otherwise. It was provided that any Judge or Judges of the Supreme Court who should consent to aid in the execution of the Act, might exercise all the powers of a Judge appointed under it, and might try suits as if he were a Small Cause Court Judge. All suits brought in the Small Cause Court were directed to be heard and

Act IX of
1850.

LECTURE
XI.

determined in a summary way, and every defence which would be deemed good in the Supreme Court, sitting as a Court of Equity, was declared to be a bar to any legal demand in the Court of Small Causes.

The Court, however, has no jurisdiction in any matter concerning the revenue or concerning any act ordered or done by any Governor or Member of Council in his public capacity ; or by any Judge or Judicial Officer in the execution of his office ; or by any person in pursuance of any judgment or order in any Court, or in any suit for libel or slander. The Judges of the Court are empowered in all cases which they have authority to try to determine all questions, as well of fact as of law or equity, as administered in the Supreme Court. With the leave of a Judge of the Supreme Court, a case, pending in the Small Cause Court exceeding Rs. 100 in value, may be removed to the Supreme Court on proof that some question of law or equity is likely to arise therein ; which, by reason either of its difficulty, novelty, or general importance, or some erroneous course of decisions on the same point in the Court of Small Causes, it may seem advisable to try in the higher Court. The Judges of the Small Cause Court are also empowered to reserve any question of law or equity on which they entertain doubts, or which they shall be requested by either party to the suit to reserve, for the opinion of the Judges of the Supreme Court

and to give judgment contingent upon that opinion.

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In 1864 an Act* was passed extending the jurisdiction of the Small Cause Courts of the three Presidencies to the recovery of any debt, damage, or demand, exceeding the sum of Rs. 500, but not exceeding the sum of Rs. 1,000, and to all actions in respect thereof, with the exceptions above given, provided that the cause of action shall have arisen, or the defendant at the time of bringing the action, shall dwell or carry on business, or personally work for gain within the local limits of the jurisdiction of the Court. Moreover, the consent of parties will give the Court jurisdiction in cases exceeding in value the sum of Rs. 1,000. In cases exceeding Rs. 500 in value, the Judges are directed to reserve any question of law or equity, or any question as to the admission or rejection of evidence as to which they retain any doubts, or which they shall be requested by either party to the suit to reserve for the opinion of the High Court, and to give judgment contingent upon that opinion. Also, if two Judges sit together and differ in opinion, the question upon which they differ shall be so reserved.

Act of
1864.

In 1860, Small Cause Courts were established† beyond the local limits of the jurisdiction of the Supreme Courts,‡ and in 1865, the law relating to

Mofussil
Small
Cause
Courts.

* Act XXVI of 1864.

† Act XLII of 1860.

‡ Act XI of 1865.

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XI.

them was consolidated and amended. Suits to the value of Rs. 500, or, if the Local Government so direct to the value of Rs. 1,000, are, generally speaking, cognizable by those Courts. There are, however, four express exceptions. They cannot entertain suits (1) on a balance of partnership accounts, unless the balance shall have been struck by the parties or their agents; (2) for a share or part of a share under an intestacy, or for legacy or part of a legacy under a will; (3) for the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury; (4) for any claim for the rent of land, or other claim for which a suit may be brought before a revenue officer, unless, as regards arrears of rent for which such suits may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction over claims to such arrears.

The constitution of the Courts, with the establishment of officers, depends upon the Local Government, the previous sanction of the Governor-General in Council being necessary. The territorial limits of each Court are fixed, and from time to time may be altered by the Local Government. They may at any time be abolished by the Local Government. In order that the Small Cause Courts may have jurisdiction to try a suit, the defendant must, at the time of its commencement, dwell or personally

work for gain, or carry on business within the local limits of the jurisdiction, unless the cause of action has arisen within those limits, in which case it is only necessary that the defendant shall, by his servant or agent, carry on business, or work for gain within them.

Power is given to reserve questions for the opinion of the High Court, and to give judgment contingent thereon. The High Court is vested with power to make and issue general rules for regulating the practice, proceedings, and forms of such Courts.

The jurisdiction of Magistrates, in regard to debts or other claims of a civil nature, and the jurisdiction of village Moonsiffs and of village or district punchayets under the Madras Code, and of Military Courts of Requests, of Cantonment Joint Magistrates, and of officers appointed to try small suits in Madras and Bombay, and of military punchayets in Madras, continues, notwithstanding the establishment of a Small Cause Court having a similar jurisdiction.

Reserva-
tion of
older juris-
dictions.

LECTURE XII.

THE INFERIOR CRIMINAL COURTS AND POLICE.

Introduction—New Criminal Procedure Code—Three proposed alterations—Suggestions of the Local Government—Report of the Committee—Criminal liability of Europeans—The Criminal Courts established by the Code—Distinction between the three classes of Magistrates—Magistrate of the District—Of the Division—Special Magistrates—Courts of Session—Powers of Criminal Courts over Europeans—Powers of the Magistrate—Powers of the Sessions Judge—Powers of High Courts—Police Administration generally—As Modified in Bengal—In Bombay Presidency—In Madras Presidency—In the Presidency Towns—Bombay—Calcutta—Suburbs of Calcutta—Madras—North-Western Provinces—Justices of the Peace—Coroners.

Introduc-
tion.

It remains to give an account of the Criminal Courts and Police organization now existing in British India. The system for the repression of crime is the most important branch of the Government of the country, the instrument by which that peace and order, which are the chief objects of Government, are daily and in all the details of life secured.

Closely connected with this Judicial and Police organization is the subject of criminal procedure. The first Code on that subject was passed in 1861. It was the product of several generations of Indian administrators and statesmen who from the first moment that they undertook the responsibility of Government, and abandoned a blind reliance on the

Mahomedan Adawluts, had undertaken the task of framing by degrees a system on which criminal justice should proceed. The system which they originally established was from time to time frequently altered, amended, and re-adjusted, and at length a hundred Regulations and Acts were consolidated and compressed into a single Code.

Then came various amendments of the Code itself, and finally Act VIII of 1869 consolidated these amendments.

Mr. Fitz-James Stephen* said of the Code of 1861 that it was "drawn by men thoroughly well acquainted with the system with which they were concerned; but I am inclined to doubt whether they did not know it rather too well, for they certainly threw the various provisions together with very little regard to arrangement and without any general plan." The result of the Amending Acts and of Act VIII of 1869 was, he considered, only to increase the confusion which had previously existed.

The consequence was that the Criminal Procedure Code of 1872 was passed, which will come into force on the 1st of September of this year. It repealed the Code of 1869 and so much of the Code of 1861 as had not been repealed, and various other Acts bearing upon minor points of criminal law and procedure. The later Code (*viz.*, Act VIII

New Criminal Procedure Code.

* Legislative Proceedings of the Council of India, vol. xi, p. 392.

LECTURE
XII.

of 1869) had made extensive amendments in the earlier law without repealing it, so that two Codes were in existence instead of one. The Act of 1872 entirely re-arranged the law, and also, which is the important point for our attention, reconstructed all the Criminal Courts throughout the mofussil.

Three
proposed
alterations.

Three important alterations of law were proposed in reference to what I have described as the rival judicial institutions of the Crown and the Company. The object was to remove unnecessary distinctions, and establish greater uniformity of criminal jurisdiction and procedure.

The first related to the jurisdiction given by the Statute of George III* to Justices of the Peace in the mofussil, and exercised by them on European British subjects. It was proposed† that that jurisdiction should extend to cases usually disposed of before Magistrates upon summons.

The second alteration proposed was to enable Sessions Judges to dispose of all cases against European British subjects, unless they insisted upon their right to be tried by the High Courts.

The third was with regard to trial by juries. Instead of convicting a man if found guilty by a larger majority of a jury, and trying him again if found guilty by a smaller majority, the concurrence of the Judge was proposed to be the condition of the

* 53 Geo. III, c. 155.

† See Legislative Proceedings (Indian Council), (1870), vol. ix, p. 481.

triumph of the majority. It was proposed therefore that, if not less than two-thirds of a jury convicted, and the Judge agreed with them, the accused was to be convicted; if there was not such a majority, or if the Judge did not agree with them, the accused would be acquitted.

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While the Bill was pending before the Council, the Government of Bengal suggested that, instead of the Justices of the Peace (who are generally mofussil Magistrates) being limited in their penal powers over European British subjects to two months' imprisonment, as was the case under the Statute of George III, those powers should be considerably extended, and that European British subjects should be rendered amenable in a great degree to the ordinary Criminal Courts of the country. This suggestion was concurred in by other Local Governments, and the Select Committee appointed to consider the Bill reported—

Sug-
gestions of the
Local
Govern-
ment.

(1). That a full power Magistrate, being a Justice of the Peace, and being, in the case of mofussil Magistrates, a European British subject, should be empowered to try European British subjects for such offences as could be adequately punished by three months' imprisonment and a fine of Rs. 1,000.

Report of
the Com-
mittee.

(2). That a Sessions Judge, being a European British subject, should be empowered to pass a sentence on British subjects of one year, or fine; and that, if the European British subject pleads

LECTURE
XII.

guilty, or accepts the Sessions Judge's jurisdiction, the Court may pass any sentence which is provided by law for the offence in question.

(3). That a European British subject, convicted by a Justice of the Peace or Magistrate, should have a right of appeal, either to the Court of Session, or High Court, at his option.

(4). That in every case in which a European is in custody, he may apply to a High Court for a writ of *habeas corpus*, and the High Court shall thereupon examine the legality of his confinement, and pass such order as it thinks fit.

This report shewed the general tendency of the new legislation and challenged discussion upon the subject of the exclusive privileges of Europeans in criminal matters. It was important that that subject should be settled, and the extent of the privileges, which certainly rest upon a reasonable and fair foundation, ascertained. The further question relating to the extent to which uniform procedure in Presidency Town and mofussil can be secured was left untouched.

Criminal
liability of
Europeans.

The system by which exemption of Europeans from liability to the criminal jurisdiction of the mofussil Courts was secured was considered to work a great and real political injury. It ensured to English wrong-doers practical immunity from punishment; the inconvenience and expense and difficulties attending a trial before a District Court,

serving to render conviction uncertain and improbable. Two extreme opinions seemed to prevail upon this subject, one that to maintain any distinction at all between European and Native in respect of criminal offences was a great injustice, and contrary to the principles on which the British Government ought to rule; the other that Englishmen were entitled to trial by an English Jury, before an English Judge, in all cases of a degree above the class of petty offences with which a Justice of the Peace could deal in a summary manner. Mr. Fitz-James Stephen's views upon the matter were expressed in the following terms :—

“ *In countries situated as most European countries are, it is no doubt desirable that there should be no personal law; but in India it is otherwise. Personal, as opposed to territorial laws, prevail here on all sorts of subjects, and their maintenance is claimed with the utmost pertinacity by those who are subject to them. The Mahomedan has his personal law. The Hindu has his personal law. Women also, who according to the custom of the country, ought not to appear in Court, are excused from appearing in Court. Natives of rank and influence enjoy in many cases privileges which stand on precisely the same principle; and are English people to be told that, whilst it is their duty to respect all those laws scrupulously, they are to claim nothing for themselves? that,

* Legislative Proceedings of the Council of India, vol. xi, p. 398.

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whilst English Courts are to respect, and even to enforce a variety of laws which are thoroughly repugnant to all the strongest convictions of Englishmen, Englishmen who settle in this country are to surrender privileges to which rightly or otherwise they attach the highest possible importance? I can see no ground or reason for such a contention. I think there is no country in the world, and no race of men in the world, from whom a claim for absolute identity of law for all persons of all races and all habits comes with so bad a grace as from the natives of this country, filled as it is with every distinction which race, caste, and religion can create, and passionately tenacious as are its inhabitants of such distinctions."

The Criminal Courts established by the Code.

The new Code is a complete body of law upon three distinct subjects, *viz.*, the constitution of the Criminal Courts, the conduct of criminal proceedings, and the exercise of a preventive jurisdiction for the purpose of securing the peace.

It is only with the first of these subjects that we have to do. In that respect the Code proceeded upon the same principle as the Bengal Sessions Judges' Act. It repealed a number of Acts and Regulations which in an obscure and fragmentary manner established Criminal Courts; and placed the constitution and powers of those Courts in a clear and distinct shape. The chief Criminal Courts, throughout the country, have

already been described. They include the High Courts, the Chief Court of the Punjab, and those highest Judicial Commissioners' Courts which in the Non-Regulation Provinces exercise a power of criminal revision, or appeal in the last resort. The Code enacted that, besides these tribunals, there should be four grades of Criminal Courts in British India:—

- (1). The Court of the Magistrate of the third class.
- (2). The Court of the Magistrate of the second class.
- (3). The Court of the Magistrate of the first class.
- (4). The Court of Session.

All criminal trials in British India must be held before one or other of these Courts. The distinction between them is that a Magistrate of the first class may sentence up to the term of two years, or impose a fine up to Rs. 1,000; a Magistrate of the second class may imprison up to six months, or impose a fine up to Rs. 200; both of them may include in the imprisonment solitary confinement, and may order a whipping. A Magistrate of the third class may imprison for one month, or impose a fine up to Rs. 50, but he may not include in the imprisonment solitary confinement, nor order a whipping.

Distinction
between
the three
classes of
Magis-
trates.

Any Magistrate may pass any lawful sentence combining any of the sentences which he is authorized

**LECTURE
XII.**

by law to pass, that is to say, he may award imprisonment in default of payment of fine, in addition to the full term of imprisonment which he is competent to award.

Besides these three classes of Magistrates, the Local Government must appoint in every district one of their number of the first class who shall be called the Magistrate of the district, and shall exercise throughout it all the powers of a Magistrate. In the Non-Regulation Provinces the Local Government may invest the Deputy Commissioner or other chief Executive Officer of the district "with power to try as a Magistrate all offences not punishable with death, and to pass sentence of imprisonment for a term not exceeding seven years, including such solitary confinement as is authorized by law, or of fine, or of whipping, or any combination of these punishments authorized by law; but any sentence of upwards of three years' imprisonment passed by any such officer shall be subject to the confirmation of the Sessions Judge to whom such Deputy Commissioner is subordinate."

Magistrate
of the Dis-
trict.

All the Magistrates of the three classes shall be appointed by the Local Government, and shall be subordinate to the Magistrate of the district, the local limits of whose jurisdiction may be prescribed by the Local Government. All Magistrates are to be independent of the Sessions Judge, except to the extent and in the manner provided by the Code.

The Local Government may divide districts into divisions, and place any Magistrate of the first or second class in charge of a division of a district. The Magistrate of the division shall be subject to the control of the Magistrate of the district, but he in his turn shall control every Magistrate within his division.

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XII.

Of the Di-
vision,

Special Magistrates may be appointed by the Local Government in any district. The Local Government may direct any two or more Magistrates to sit together as a Bench, and may invest such Bench with the powers of a Magistrate of the first, second, or third class, and direct the Bench so constituted to try such cases or such classes of cases only, and within such limits as it thinks fit; and in the absence of such direction, the Bench shall have the powers of the highest class to which any one of its members belongs, and who is present taking part in the proceedings.

Special
Magis-
trates.

With regard to Courts of Session, every province shall be divided into sessions divisions according to the existing local jurisdiction of Courts of Session; the Local Government being empowered to alter from time to time the number or extent of such divisions. There shall be a Court of Sessions and a Sessions Judge for every sessions division. The Local Government may appoint Additional and Joint Sessions Judges who shall exercise all the powers of the Court, but shall try such cases only as the Local

Courts of
Session.

LECTURE
XII.

Government directs them to try, or as the Sessions Judge of the division makes over to them for trial.

The Local Government may also appoint Assistant Sessions Judges, who shall exercise all the powers of the Court, except the power of hearing appeals and of passing sentences of death, or transportation, or imprisonment for more than seven years. They can try those cases only which the Sessions Judge makes over to them ; and any sentence which they pass of more than three years' imprisonment, is subject to confirmation by the Sessions Judge.

Powers of
Criminal
Courts over
Europeans.

The provisions of the Code, unless it is otherwise distinctly expressed, apply to all persons without distinction of race; but a separate chapter of it relates to the investigation and trial of offences committed by European British subjects.* The first provision in this exclusive chapter is that, in order to have any criminal jurisdiction in reference to a European British subject, a Sessions Judge must himself be of the same nationality. The second provision is that for purposes of investigation, the judicial officer must hold the double office of Magistrate of the first class, and of Justice of the Peace, and must also be a European British subject.

* These include (see Section 71 of the Code) (1) all subjects of Her Majesty born, naturalized, or domiciled in the United Kingdom of Great Britain and Ireland, or in any of the European, American, or Australian possessions of Her Majesty or in the colony of New Zealand, or in the colony of the Cape of Good Hope or Natal; (2) children and grandchildren of any such persons by legitimate descent.

A Magistrate may entertain a complaint, and issue process to compel the appearance of the accused without regard to nationality; but if the accused is a European British subject, such process must be returnable before a Magistrate competent to enquire into or to try the case. Such Magistrate shall have power to punish up to three months' imprisonment, or up to a fine of Rs. 1,000, or both. In cases not adequately punished by a sentence of that character, the Magistrate must commit the accused to the Court of Session, unless the offence complained of be punishable with death or transportation for life, in which case the commitment shall be to the High Court.

LECTURE
XII.

Powers of
the Magis-
trate.

Sessions Judges or Additional Sessions Judges, and, when specially empowered by the Local Government, Assistant Sessions Judges, who have held that rank for not less than three years, may pass on European British subjects any sentence warranted by law not exceeding one year's imprisonment, or fine, or both.

Powers of
the Ses-
sions Judge.

If, at any stage of the proceeding, the Sessions Judge thinks that such sentence would be inadequate, he shall record his opinion to that effect, and transfer the case to the High Court. In any case where the Sessions Judge is not a European British subject, and the Magistrate thinks fit to commit the accused, he shall report the case for the orders of the High Court.

LECTURE
XII.Powers of
High
Courts.

A European British subject, convicted by a Magistrate, may appeal to the Court of Session or to the High Court; convicted by a Court of Session he may appeal to the High Court. The High Court is vested with power to order any European who complains of unlawful detention within its jurisdiction to be brought before it to abide its further order, but the High Court is expressly prohibited from issuing any writ of *habeas corpus*, *mainprise*, *de homine replegiando*, or any other writ of the like nature beyond the Presidency towns.

The Magistrate is bound to ask any accused person whom he has reason to believe is a European subject, whether he is so or not; and if the accused does not claim before the Magistrate who tries or commits him to be dealt with as a European British subject, he shall be held to have waived his privilege.

The High Courts are prohibited by the Code from dealing with any proceedings of Magistrates against European British subjects outside the Presidency Towns, according to the law of England, relating to the dealings of the superior English Courts with the proceedings of the Justices of the Peace. They must deal with such proceedings according to the provisions of the Code or of any other law relating thereto. They are vested with the same powers with respect to enquiries and charges against European British subjects, as Courts of Session have with respect to enquiries and charges against other

persons. The procedure laid down in the Code, and not the law of England relating to Justices of the Peace, shall govern such proceedings.

LECTURE
XII.

With regard to the Police administration in India Act V of 1861 remains as the basis upon which the general law on that subject outside the Presidency towns rests, modified in different localities by special Acts. It has been applied generally throughout the country.

Police
Adminis-
tration
generally.

In Bengal an Act was passed in 1867 which abolished Municipal Chokidars and provided that the Police in towns should be enrolled under the general Act, the expenses to be provided by the town for which they were appointed. Another* Act was passed in the next year constituting other and smaller townships than those which had previously existed. The Police of those towns were to be paid by the inhabitants, but they also were to be appointed under the general Act.

As modi-
fied in
Bengal.

In the Presidency of Bombay, excluding the town, a local Act has been passed called the Bombay District Police Act 1867. It provides that the superintendence of the Police throughout the Bombay Presidency shall vest in the Governor, and that its administration shall vest in Commissioners; and in each district in a District Superintendent,

In Bombay
Presi-
dency.

* Act VI of 1868 (Bengal.) The Police in Bengal will probably hereafter be organized and administered under the Bengal Municipalities' Act, 1872.

**LECTURE
XII.**

subject to the control and direction of the Magistrate of the District. The duties and powers of the Police are provided for in the Act.

The village Police* throughout each district is administered by the Magistrate thereof. He can delegate that administration to any Magistrate with full powers having revenue charge, and may depute any authority which belongs to him to the District Superintendent of Police. He may appoint a Police Patel for each village, but must in making the appointment pay due regard to any hereditary claim to perform the duties connected with it. The duties of the Police Patel are to act under the orders of the Magistrate, to furnish him with returns and information as to the state of crime and all matters connected with the village Police, the health and general condition of the community in his village. He must execute all orders and warrants issued by the Magistrate, and generally assist the Police Officers when called upon so to do. He has general authority over the village servants. He must dispose of the village establishment so as to afford the utmost security against robbery, breach of the peace, and acts injurious to the public and village community, and must report to the Magistrate any instance of misconduct or neglect.

In Madras
Presi-
dency.

The regulation of Police within the Madras territories is provided for by Act XXIV of 1859

* See Act VIII of 1867 (Bombay).

which was amended by a local Act, V of 1865. The superintendence of the Police was vested in the Governor in Council with power to give exclusive authority to others to appoint, supersede, or control any Police functionary. An Inspector-General of Police with such subordinates as the Government may think fit are responsible for the administration of the force. Special Police officers may be appointed in case of tumult or riot by the nearest Magistrate. The duties of Police officers are, to use their best endeavours and ability to prevent all crimes offences and public nuisances; to preserve the peace, to apprehend disorderly and suspicious characters, to detect and bring offenders to justice, to collect and communicate intelligence respecting the public peace, and promptly to obey and execute all orders and warrants lawfully issued to them.

With regard to the three Presidency towns, the Police administration was provided for by Acts XIII of 1856 and XLVIII of 1860, and those Acts remain in force as far as the town of Bombay is concerned.

In the Presidency
Towns.

But in Calcutta Act IV of 1866 of the Bengal Council has repealed them so far as they relate to the town of Calcutta, and has provided that the administration of the Police in that town should be vested in an officer styled the Commissioner of Police and appointed by the Lieutenant-Governor,

Calcutta.

LECTURE
XII.

who can also appoint one or more deputies to perform any of the Commissioner's duties under his orders. A special Police Force is provided for the town of Calcutta, its strength being determined by the Lieutenant-Governor with the sanction of the Supreme Government. The Commissioner appoints them, and may fine, suspend, or dismiss them. He may appoint special constables on emergency with the powers of ordinary officers of Police.

Calcutta is divided into Police Districts by the Lieutenant-Governor, and the existing Magistrates of Police are appointed under this Act. The powers of the Magistrates, the Commissioner, and the Police are carefully defined under the Act:

Suburbs of
Calcutta.

Ten days before this Act was passed another Act, *viz.*, II of 1866 (Bengal Council) received the assent of the Governor-General. It enabled the Lieutenant-Governor to exclude the suburbs of the town of Calcutta from the general Police District of the Provinces, and to order the constitution of a Police Force therein to be under the exclusive direction and control of the Commissioner of Police for the town of Calcutta. No special Magistrate of Police is appointed for the suburbs, but the powers of the Commissioner therein are similar to those which he exercises in Calcutta.

Madras.

With regard to the town of Madras, the Police Acts XIII of 1856 and XLVIII of 1860 were repealed by the local Act VIII of 1867. The town

Police was by the new Act incorporated with the general force of the Presidency, and the town was declared to be part of the general district, the whole being rendered subject to the provisions of Act XXIV of 1859. A Commissioner of Police was appointed for Madras, subject to the authority of the Inspector-General of the Presidency. Power was given to the Government to divide the town into as many Police districts as they should think fit or to appoint Magistrates of Police. The town Police is directed to be governed by the provisions of the Criminal Procedure Code.

In 1869 an Act* was passed by the Governor-General in Council to provide for the maintenance of the rural Police in the North-Western Provinces and to define the law relating to village watchmen. The appointment of such watchmen rests with the Magistrate of the District, but it must be exercised in favour of the nominee of any person authorized to nominate, provided he is a fit person and selected within fifteen days after the occurrence of a vacancy. These village watchmen must perform within their villages all the duties imposed on Police officers by the general Police Act, in addition to other special duties within their villages.

In 1869 the law relating to the appointment of Justices of the Peace was consolidated and amended by Act II of that year passed by the Governor-

* Act III of 1869.

LECTURE
XII.

General of India in Council. The existing law on the subject was repealed, and it was provided that except in the Presidency towns the Governor-General of India in Council and every Local Government within its provinces might appoint as many Civil servants or other British inhabitants as they might think properly qualified to act as Justices of the Peace within such territories as might be notified. In the Presidency towns the appointment of Justices of the Peace rests with the Local Government, except that the Governor-General in Council may appoint for Calcutta. For those towns any persons resident within British India, and not being the subjects of any foreign State, who may be deemed qualified, are eligible.

Justices of the Peace have power to commit for trial European British subjects to the Court prescribed in that behalf by the law in force for the time being, and to do all other acts appertaining to their office which are prescribed by any law for the time being in force. The Mofussil Justices of the Peace, being servants of the Government, have power to commit for trial European British and Christian subjects of Her Majesty within the dominion of Indian Princes in alliance with Her Majesty. A Justice of the Peace may be suspended or dismissed by the Government which appointed him.

Coroners.

The law relating to Coroners in the Presidency towns was consolidated by Act IV of 1871. Every

Coroner is appointed and may be suspended or removed by the Local Government. He must enquire into the cause of death whenever any person has died by accident, homicide, suicide, in prison, or suddenly by means unknown. On receiving notice of such death he must summon a jury, view and examine the body, summon witnesses, and finally draw up the inquisition according to the finding of the jury or the opinion of the majority. It is no longer the duty of the Coroner to enquire whether any person dying by his own act was or was not *felo de se*, to enquire of treasure trove or wrecks, to seize any fugitive's goods, to execute process, or to exercise any Coroner's jurisdiction not especially conferred by this Act.

